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HILL *v.* VILLAGE CREEK DRAINAGE DISTRICT.

4-8772 219 S. W. 2d 635

Opinion delivered March 28, 1949.

Rehearing denied May 9, 1949.

[redacted]

W. E. Beloate, for appellant.

Smith & Judkins and *Blackford & Irby,* for appellee.

GEORGE ROSE SMITH, J. This is the third attack upon a sale by which certain land in the town of Minturn was sold to the appellee district in 1939, in proceedings for the collection of delinquent drainage taxes. The sale was first questioned by appellant's sister, Fairbelle Mitchell, who then asserted title to the property. After Mrs. Mitchell's death that suit was continued by her daughter, as her sole heir. The case was before this court twice, the decisions being in favor of the district and its grantees. *Shinault* v. *Wells,* 208 Ark. 198, 186 S. W. 2d 26; *Wells* v. *Golden,* 209 Ark. 378, 191 S. W. 2d 251. Mrs. Mitchell's widower and daughter then brought a suit in federal court, but again the attack failed. *Mitchell* v. *Village Creek Dr. Dist.,* 158 Fed 2d 475 (C.C.A. 8).

Appellant now assails the district's proceedings upon the basis of objections which were or could have been raised in the earlier cases. To meet the defense of

res judicata he relies upon a lost unrecorded deed by which Mrs. Mitchell is said to have conveyed to him a life estate, in 1924. The chancellor doubted if his testimony was sufficiently clear and convincing to establish the lost instrument, but we prefer to rest our decision on the broader ground of estoppel. Appellant actively supported his sister when she claimed the land in the first suit. He acted as her agent in making a tender of taxes. He testified in her behalf, saying that he had been in possession of the property for nineteen years as Mrs. Mitchell's tenant. Even if his account of the lost deed be accepted, it merely proves that appellant concealed his interest in the property by swearing that he was merely a tenant and thus speculated upon the hope that his grantor would prevail in her action. Under familiar principles of equitable estoppel he cannot be permitted to say that he is not bound by the earlier judgment. *Collum* v. *Hervey,* 176 Ark. 714, 3 S. W. 2d 993; *Williams* v. *Davis,* 211 Ark. 725, 202 S. W. 2d 205.

Affirmed.

COOK, COMMISSIONER OF REVENUES *v.* PRANGER.

4-8806 219 S. W. 2d 420

Opinion delivered March 28, 1949.

O. T. Ward, for appellant.

Kenneth C. Coffelt, for appellee.

Ed. F. McFaddin, Justice. The State Commissioner of Revenues (hereinafter referred to as "State Commissioner") filed a suit for discovery. From a decree refusing the prayed relief, there is this appeal.

From October 1, 1943, to February 12, 1948, H. W. Pranger owned and operated a service station in Benton, Arkansas, and in the station he sold various items of merchandise as a retailer. He failed to comply with any of the provisions of the Arkansas Gross Receipts Act (Act 386 of 1941); that is, he failed, entirely, to obtain a permit or make a report or pay the State the tax due on the retail sales. On February 12, 1948, Pranger sold his service station and entire stock of merchandise to J. D. Flournoy and J. C. Heath for approximately $6,000, and made disposition of the money as hereinafter detailed.

In March, 1948, the State Commissioner determined a tax liability of $1,272 against Pranger, because of said retail sales and the delinquencies as above mentioned. A certificate of indebtedness was filed in Saline county as provided by § 11 of said Act 386. After execution and attachment had each been returned *nulla bona,* the State Commissioner on April 30, 1948, filed petition for discovery in the Saline Chancery Court. The defendants were H. W. Pranger, Mrs. H. W. Pranger, J. D. Fournoy, J. C. Heath and the Benton State Bank. In the petition the State Commissioner set out the facts as heretofore stated, and made other allegations, and sought to obtain certain money and property, claimed to be-

long to H. W. Pranger and in the possession of the other defendants, in an amount sufficient to satisfy the State's claim against H. W. Pranger.[1] In addition to the facts as previously stated, the following matters were developed in the trial in the Chancery Court.

1. Flournoy and Heath admitted owing Pranger a balance of $228.10 for the service station and merchandise. They were ordered to pay that balance into the court.

2. Flournoy and Heath had paid Pranger $5,832.46 on February 14, 1948, and he had deposited that amount to his credit in the Benton State Bank. From such money he had paid his debts to the bank and his supplying oil company; and on March 16, 1948, had deposited $1,558.31 to the individual account of Mrs. H. W. Pranger, his wife. There was left only $30 in Pranger's account in the bank, which was held to await the outcome of this suit.

3. From the said $1,558.31, Mrs. Pranger had left in her said bank account at the time of the trial, only $569.70; and she claimed this to be her separate property. In addition, Mrs. Pranger claimed two automobiles (a 1940 Buick sedan and a 1936 Ford pick-up truck) to be her separate property, even though she had registered both of these vehicles in her husband's name. It was testified that Mrs. Pranger's father gave her the money used by Mr. Pranger in the original purchase of the service station and the two automobiles; and it was claimed that Mrs. Pranger had allowed Mr. Pranger to use her money and the vehicles. The Chancery Court held that the bank account and the vehicles were the individual property of Mrs. Pranger, and denied the State's claim. To reverse that decree, the State has appealed.

In *Bunch* v. *Empire Cotton Oil Co.*, 158 Ark. 462, 250 S. W. 530, the wife had allowed her husband to use her separate property for many years as his own, and, when the husband became financially embarrassed, the wife

[1] It appears that the State has pending an action against J. D. Flournoy and J. C. Heath, seeking to hold them liable for the amount due the State by Pranger; but that action is not before us in the present appeal, and nothing herein is in determination of that case.

attempted to assert her separate property claim against the creditors of the husband. Chief Justice McCulloch, speaking for this Court, said:

"We are of the opinion that Mrs. Bunch is estopped to claim a beneficial interest in the property, by reason of the fact that she has permitted the same to be held ostensibly by her husband to form a basis of his own credit. The case falls within the rule often announced by this court that 'where a married woman permits her husband to use her separate estate as his own, and to obtain credit on the faith that the estate so used is his own, she will not be allowed afterwards to assert her claim to the property as against her husband's creditors.' *Driggs & Co's Bank* v. *Norwood,* 50 Ark. 42, 6 S. W. 323, 7 Am. St. Rep. 78; *Geo. Taylor Com. Co.* v. *Bell,* 62 Ark. 26, 34 S. W. 80; *Davis* v. *Yonge,* 74 Ark. 161, 85 S. W. 90; *Sharp* v. *Fitzhugh,* 75 Ark. 562, 88 S. W. 929; *Roberts* v. *Bodman-Pettit Lbr. Co.,* 84 Ark. 227, 105 S. W. 258; *Latham* v. *First National Bank of Fort Smith,* 92 Ark. 315, 122 S. W. 992; *Goodrich* v. *Bagnell Timber Co.,* 105 Ark. 90, 150 S. W. 406."

The quoted holding in the Bunch case is ruling here. The State, in its claim for retail sales tax, is certainly in as strong a position as any other creditor. Mrs. Pranger, by her leniency with her husband, put it within his power to become indebted to the State for the retail sales tax. If she had not let him use her money to purchase and operate the service station, then he would never have become indebted to the State for the tax, the amount of which is not here contested. The vehicles were also used in the business of the service station. From 1943 to 1948, H. W. Pranger was listed as the sole owner of the service station and the vehicles. The State is entitled to the balance in Mrs. Pranger's bank account and a lien on the two vehicles.

The judgment of the chancery court is reversed, and the cause is remanded with directions to enter a decree in accordance with this opinion.

WEST MEMPHIS FLYING SERVICE, INC., *v.* AMERICAN AVIATION & GENERAL INSURANCE COMPANY.

4-8782 219 S. W. 2d 215

Opinion delivered April 4, 1949.

[redacted]

McDonald, McDonald & Kuhn, Louis E. Black and *Cecil B. Nance,* for appellant.

Buzbee, Harrison & Wright, for appellee.

GRIFFIN SMITH, Chief Justice. A Piper Cub airplane, piloted by Thomas J. Jordan, Jr., crashed and was demolished. It belonged to West Memphis Flying Service and was insured up to $1,750 by American Aviation. When sued the insurer defended on the ground that under Exclusion (d) of the policy there was no coverage while the craft was being operated in violation of the provisions of the Civil Aeronautics Administration, or its successor, "with respect to the pilot." Jordan had a certificate as student pilot, issued by the Administration of Civil Aeronautics, Department of Commerce. Rules prohibit students from piloting an aircraft carrying a passenger. It is stipulated that William A. Goddard, as a passenger, was with Jordan when the crash occurred, and that the plane was being used without the plaintiff's knowledge or consent.

Appellant thinks the trial Court's conclusion that the plane was not insured against loss in the circumstances shown was due to a misconception of the Commerce Department's basic rule-making power, and the law. It was shown that prior to 1940 matters pertinent

to the controversy here were dealt with by Civil Aeronautics Authority. As thus created, the so-called Authority consisted of a five-man board, with an Administrator.

It is contended that the Administrator, alone, was not authorized to issue safety regulations affecting pilots. By Congressional Resolution effective June 30, 1940, name of the five-man Authority was changed to Civil Aeronautics Board. Appellant argues that the Board, formerly known as the Authority, retained power to establish safety standards, and that no such agency as Civil Aeronautics Administration, or Administrator of Civil Aeronautics, is in existence; hence neither could have issued restrictive regulations, as mentioned in the policy, and there was no violation of "provisions of the Civil Aeronautics Administration."

We readily agree with the trial Court. The Federal Government uses "Administrator of Civil Aeronautics," and "Civil Aeronautics Administration" interchangeably. This was testified to by an attorney and aviation expert called by appellant, whose explanation was that rules were made by the Board "and enforced by the Administrator or Administration, whichever you want to call it."

The pilot's license was captioned, "United States of America, Department of Commerce, Civil Aeronautics Administration." It was issued "By direction of the Administrator of Civil Aeronautics." Mr. Maurer, testifying for appellant, said that members of the public generally refer to the Civil Aeronautics Administration "when, practically, they mean the Administrator of Civil Aeronautics." The Government's recent publication, "Organization of Federal Executive Departments" (printed on a sheet 36 by 44 inches) lists—under the Department of Commerce—"Civil Aeronautics Administration, Office of the Administrator." It is dated January 1, 1949. "To accompany Committee Report No. 5."

Our view is that "Administration," as used in the policy, and as the term was treated by the contending parties, meant the Washington agency having control of

aviation, including "Board," "Authority," "Administrator." Congress had lodged with such bureau full power to restrict use of the air in its relation to aviation. The high degree of scientific and practical knowledge required to make flying reasonably safe justifies the enforcement of rigid rules. In the case at bar the insurer and the insured will be conclusively presumed to have been familiar with these rules and their source. Since the terms "Administrator," and "provisions" must have been understood in the same sense by the contracting parties, effect will be given the exclusion clause, affirming the judgment.

WOOLDRIDGE *v.* HOTZE.

4-8786 219 S. W. 2d 216

Opinion delivered April 4, 1949.

J. H. Carmichael, Jr., J. H. Carmichael, Sr., and *Donham, Fulk & Mehaffy,* for appellant.

House, Moses & Holmes, for appellee.

HOLT, J. Peter Hotze died testate in April, 1909. Under the terms of his will, executed September 27, 1907, he devised all his real estate in trust for the purpose of paying the income therefrom to his three children during their lives with the *corpus* to be delivered to his grandchildren upon the death of his three children

and "after the youngest living child . . . born to either . . . said children shall arrive at the age of 21 years." The will further devised to the trustee $15,000 in money or securities. . . . "He shall invest, reinvest, and keep invested the $15,000 herein given him in trust, in good and safe securities, so that he may at all times have a fund with which to make or pay for improvements upon said property, which to him may seem best. The occasion for using any part of said fund shall be at the discretion of my said son and trustee.

"In case said fund shall be reduced below $15,000 at any time or exhausted by its use aforesaid, then he shall annually set apart $1,500 from the new income of said property, real and personal, for the purpose of reestablishing said fund, until it shall aggregate the sum of $15,000. . . .

"It is the purpose of this will to preserve my real property not specifically described herein, united, and to keep a fund as above provided out of which the same can be at any time improved, when it shall become necessary in the judgment of my said trustee to make any improvement thereon and to divide the net annual income arising from said property, real and personal, in equal parts among my said children during their natural lives respectively, it being understood that the lawful issue of any deceased child shall represent and take the share of the deceased parent, the same as such parent would do if living."

In 1937, the trustee in succession filed suit in which he asked for instructions, under the terms of the will, relating to the creation of the special fund in the amount of $15,000 or for a construction of the will in this regard. His petition was heard by the court and all beneficiaries or interested parties were present, including appellants, Clara Wooldridge and Peter Wooldridge, in person or by attorney. At the conclusion of the hearing, the court, among other things, decreed:

"It is further found that between the time the said Peter Hotze, deceased, made his will and the time of his

death, the condition of his estate had substantially changed, and at the time of his death he did not have $15,000 in securities to leave to Frederick Hotze, the trustee under his will, for the purpose of making improvements on the property; and that provision in his will is construed as having contemplated that amount of securities would be passed to the trustee for the purpose of making improvements on the property, and that unless it was so passed to the trustee by the testator, the trustee was not required thereunder to build up the said sum of $15,000 out of income; and Emmet Morris, Trustee, is instructed not to build up said $15,000 for improvements out of income by setting aside from income the sum of $1,500 annually, or otherwise."

Thereafter, acting in accordance with the above decree, the trustee in succession has never attempted to create the said $15,000 fund, but has distributed the income to all beneficiaries, including appellants.

January 10, 1948, the present litigation arose upon the filing of a petition by the trustee in succession in which he asks for instructions whether he should charge certain expenses which he had incurred in repairing the roof, amounting to $1,149, and rebuilding the foundation and wall at a cost of $4,454.29, of a certain building, held in trust, to income, and thus to the life tenant under the trust, or to the *corpus* of the estate, and thus to the remaindermen.

Appellants alleged that the 1937 decree, *supra,* was erroneous, and that it was the duty of the trustee to build up the fund of $15,000 and to maintain it at that level at all times thereafter and prayed that the court order that said fund be established and maintained in accordance with the testator's will, and that the cost of the wall and repairs be charged to income and not to the *corpus.*

The trustee alleged that all questions presented were now *res judicata* by reason of the decree, *supra,* of the court on April 9, 1937, and that the cost of said improvements, permanent in nature, should be paid out of the *corpus.*

Upon a hearing the court found and decreed: "It appearing to the Court that the trustee has asked for instructions as to how to charge the expense incurred in reconstructing the east wall of the building located at the corner of Second and Main Streets and the cost of placing a new roof thereon; that Clara Wooldridge and Peter Wooldridge have raised a question of the construction of the will of Peter Hotze, deceased, as provided under the terms of the will of Peter Hotze, deceased.

"It appearing to the Court that in March, 1937, in a controversy between the same parties hereto, Case No. 51366, after a full hearing, this Court, on April 9, 1937, entered an order with respect to the $15,000 and, in that respect the Court found as follows: (Here is embodied the excerpt from the 1937 decree, *supra.*)

"It further appearing to the Court that the testimony taken in 1937 was introduced as part of the record in this hearing, and it appears to the Court that the condition of the Peter Hotze estate is practically similar to the conditions in 1937; Mr. Morris, the Trustee, at both hearings testified that the estate had considerable cash on hand in addition to the land. It does not appear that there is any substantial difference in the Estate of Peter Hotze in this respect at the time of the hearing in 1937 and at the present date.

"The parties all assented to the order entered in 1937 with respect to the said fund; the $15,000 fund was not set up by the trustee for the purpose of repairs, and all the income has been divided between the beneficiaries since that in accordance with said order; and, under these circumstances the Court finds that all the respective parties to this controversy are bound by said order."

It is, therefore, ordered and decreed: "1. That Emmet Morris, as Trustee, is instructed not to build up the $15,000 fund; 2. That the cost of the roof, amounting to $1,149, should be charged to income collectible during the year 1948, by the trustee; 3. That the trustee convert sufficient assets belonging to the *corpus* to pay the cost of constructing a brick wall, amounting to

$4,454.29; 4. That the cross complaint of Clara Wooldridge, *et al.,* be and the same is hereby dismissed for want of equity."

This appeal followed.

We hold that the trial court correctly held that the issues now presented are *res judicata* by reason of the 1937 decree, *supra.* Appellants were bound by the construction placed on the will by the Court in that decree. It is undisputed that at the time that decision was rendered appellants were parties, consented to that decree, and have acquiesced in the court's construction of the will for more than 10 years thereafter.

In the recent case of *Meyer* v. *Eichenbaum, Executor,* 202 Ark. 438, 150 S. W. 2d 958, in which the doctrine of *res judicata* was considered and applied, we said: "The chancery court is a court of competent jurisdiction. The judgment there was upon the merits, and the parties are the same in the instant suit as in the original suit. The matter argued here was an issue and directly adjudicated upon and was necessarily involved in the determination in the chancery court in the former case. Under all the authorities, where the judgment is upon the merits, the parties the same, the subject-matter the same, and the issue the same, the former judgment constitutes a bar to a new action.

"For a discussion of the doctrine of *res judicata* see *McCarroll, Commissioner of Revenues* v. *Farrar,* 199 Ark. 320, 134 S. W. 2d 561. Also, see *Cates* v. *Mortgage Loan & Ins. Agency, Inc.,* 200 Ark. 276, 139 S. W. 2d 19."

The Supreme Court of Connecticut, in pointing out the grounds for upholding a former decree in which the provisions of a will were construed, in the case of *Farnam* v. *Farnam,* (1910) 77 Atl. 70, said: "To the extent that this judgment established the construction of the will, or declared its operative effect in matters concerning which there were or are existing rights and interests, it was a judicial declaration which we ought not to disturb, whatever our conclusions might be upon the questions decided, were they now presented for the first time. The parties interested have for these many years, doubt-

less, regulated their lives and their affairs in conformity to it, and all those and their privies whose rights as between each other were thereby directly fixed and determined acquired property rights which became vested in them by the court's action. (Citing many cases.)

"We are thus enabled to begin our inquiries with certain premises fixed. In so far as the questions presented to us are but repetitions in another form of those heretofore adjudicated, we have only to reassert what was then said. In so far as our advice is asked for the purpose of having a formal declaration concerning conditions not directly passed upon before, but which involve as factors in them conclusions embodied in the former judgment, or underlying it, it is our manifest duty to accept the former conclusions as fixing the law of the instrument in so far as they go, and thus pursue the only course which can make the operation of the will consistent throughout, and deal with the rights and interests of all parties upon an equal basis." See, also, 136 A. L. R. 1184.

In 57 Am. Jur., § 1034, p. 670, the text writer says: "Application of Rule of *Res Judicata.*—Problems relating to the conclusiveness of judgments or decrees in actions or proceedings involving the construction of wills may, for the most part, be solved by the application of a few of the universally recognized principles relating to the doctrine of *res judicata* generally; other things being equal, a judgment rendered in such an action or suit is as conclusive on the rights of the parties thereto as it would be in any other litigation."

Finding no error, the decree is affirmed.

Justice George Rose Smith not participating.

SINGER *v.* ARKANSAS NATIONAL BANK OF HOT SPRINGS, EXECUTOR.

4-8837 219 S. W. 2d 219

Opinion delivered April 4, 1949.

House, Moses & Holmes and *W. R. Roddy,* for appellant.

Wootton, Land & Matthews, for appellee.

HOLT, J. Della B. Singer died testate October 11, 1944. She left surviving her husband, appellant, now 73 years of age. Under the terms of her will, appellee, Bank, was named her executor. Appellee, May 29, 1945, brought the present suit against appellant for an accounting, alleging in substance that from about 1924 until the death of his wife, appellant, as trustee and agent, had handled her property generally, involving in excess of $750,000, had made investments in Government bonds and securities, kept bank accounts, and occupied a fiduciary relationship.

Appellant answered admitting that he had handled and managed his wife's property, but denied that in doing so he acted as trustee, agent, or in a fiduciary capacity and further denied that appellee was entitled to an accounting, in the circumstances.

The Court appointed Jacob L. King master to state an account, and on December 10, 1946, he filed his report.

July 9, 1948, after an extended hearing during which voluminous testimony was presented by the parties, the trial court found that appellant, Charles Singer, was not acting in the capacity of trustee of assets belonging to his wife from 1924 to 1944, inclusive. The court further found that appellant had not accounted for $18,910.74, and that he owed the estate this amount for which decree was entered for the executor, appellee.

The cause comes here on appellant's direct appeal and appellee's cross appeal.

As we read the record, the primary and decisive question presented is whether, in the circumstances, an accounting was required of Charles Singer, or whether Charles Singer occupied such fiduciary relationship to-

ward his wife that would give a court of equity power to require an accounting.

The material facts appear to be practically undisputed.

Della and Charles Singer were married in St. Louis, Missouri, in 1907. They moved to Hot Springs, Arkansas, in 1912 where appellant operated a tailoring business until 1923 when, at his wife's request, he sold his business. From the earnings of business and sale thereof he had accumulated approximately $18,000 cash. Shortly before this sale, Mrs. Singer, through her brother in St. Louis, had inherited a one-sixth interest in the income, during her life, from a large estate from which she had received in monthly payments at the time of her death in 1944, a total of $749,420.21. Prior to her inheritance, Mrs. Singer had no estate or income of her own and was solely dependent upon appellant for support. Immediately following her good fortune and during all the years from 1923 to October 11, 1944 (when Mrs. Singer died), they had commingled and mixed all their assets, which at Mrs. Singer's direction, and with her consent, appellant handled generally. He made purchases of Government bonds with her knowledge and consent, not only for her but for himself. He opened ten joint bank accounts in various banks in and out of Arkansas, rented lock boxes in their joint names, wherein he stored bonds and assets. From Mrs. Singer's funds he built their home in Hot Springs at a cost of approximately $60,000, purchased automobiles, hired a chauffeur, servants, nurses when needed, spent vacations in Florida and made trips to California. When they moved to Hot Springs, Mr. Singer was suffering from arthritis and Mrs. Singer was a semi-invalid, though always mentally alert, much of the time after their removal to Hot Springs and until her death.

No complete record was kept by appellant of all moneys that passed through his hands, except bond purchases and other investments, for the reason that his wife consented to the manner in which he was handling her money and required no such completed record, or accounting.

The record discloses that their married life was harmonious and congenial, and pictured a couple devoted, happy, and with each holding the absolute trust and confidence of the other.

The record is devoid of any suggestion of fraud, overreaching or undue influence on the part of Charles Singer or of any mental incapacity on the part of his wife. Following her death, appellant coöperated with the executor to the fullest extent. He readily disclosed and produced all assets which had come into his hands which he held, as indicated, in Arkansas and outside the State. He aided the executor in making a complete inventory of these assets and about the 24th of April, 1945, he made a settlement with the executor of his interests in his wife's estate, which settlement had not been questioned until the present suit for an accounting was filed. True it is that appellant handled more than $750,000 of his wife's money over the period from 1923 to 1944, but it is undisputed that she permitted him to do so without restraint. She also made gifts to him of large sums of money, and required no accounting from him, which obviously she had the right to do if she so desired.

When Mrs. Singer made her will, June 2, 1944, she gave her husband the home with its furnishings, $100,000 in cash, and after a large number of other bequests, she provided that her executor pay to her "beloved husband," during his life, the net income from her trust estate, and in addition that he pay all hospital and medical bills of her husband, and if necessary to use the principal for such purpose. She further stipulated in her will: "I appreciate that my husband is fully competent to fully handle and manage my estate, but it is my wish and desire that my husband, for the remainder of his lifetime, will not be burdened with the care and management of business affairs," and further "it is my will and desire that in the performance of the management of my estate and in the sale and purchase of assets, including the transfer thereof, that said Trustee will freely consult and confer with my beloved husband, to the end that he will, at all convenient times, be informed

of such management, and in return therefor the Trustee will receive the benefit of his good advice.''

The Master's report did not purport to be a complete report and accounting of all moneys, receipts and disbursements handled by appellant for the simple reason that he could only work from such records as appellant kept. Obviously he could not make an accurate accounting and audit when appellant was not required by his wife to keep complete records or to account to her. The Master testified that it was not possible for him to make an accounting with any degree of accuracy whatever with the records that he had and that he made no attempt to set up in his report the amount of money that Charles Singer received from his wife.

He further testified that in his efforts to state an account, no transactions or items of $200 or less, were considered. The number, or total, of such items was not shown.

Robert B. Wilson, an employee of the auditing firm of Russell Brown & Company, also attempted to make an audit and accounting, and he tended to corroborate the Master's testimony. He testified that as a matter of fact, he could not certify a balance sheet on his report, neither could he give a positive statement to the court where he could certify it to be correct due to the lack of information and records.

Of much significance in this case is the fact that all beneficiaries and parties having any interest in Mrs. Singer's estate and who were made defendants to this suit, answered appellee's complaint denying appellee's alleged right to an accounting, and alleged that they were opposed to this litigation and prayed that appellee's complaint be dismissed.

In the circumstances, and after consideration of all the testimony, we have concluded that an accounting was not warranted, that while the trial court correctly held that Charles Singer was not acting as trustee of assets belonging to his wife from 1924 to her death in 1944, there was error in the decree directing an accounting. The most the testimony shows is that appellant was his

wife's agent in the sense that he followed her directions and acted with her consent, and was not acting in a fiduciary capacity.

"The duty of an agent to account . . . arises, not from the bare relation of agency, but rather from the fiduciary character of the relation between the parties, which character forms the basis for equitable interposition and gives the chancery court jurisdiction of a suit by the principal." 2 Am. Jr., § 286, p. 226.

"Where principal, expressly or by implication, has led liquidating agent to believe that he would not be required to account, or that particular method of accounting would be satisfactory, principal cannot complain that agent, acting in good faith, has not kept accounts with strictness which might otherwise have been required." *Pennsylvania Trust Co.* v. *Billman, et al.*, 61 Fed. 2d 382, (Headnote 3).

In the well reasoned case of *Barnett* v. *Kemp*, 258 Mo. 139, 167 S. W. 546, 52 L. R. A. N. S. 1185, in which the facts are, in effect, similar to those presented here, and the reasoning sound, the principals of law are well stated and apply with equal force here. We quote somewhat extensively from that opinion.

"To sustain an action for an accounting, some such business relation must be shown to have existed between the parties as to create a liability on the part of the one to the other. More briefly, the basis of the action must be the existence of the relation of principal or agent, in some one of the varied forms of business activity under which one, being authorized, acts for and on behalf of another. In fact, no form of human action, save by the actor himself, is possible without the creation, although it may be for the one act alone, of the relation of principal and agent. It was created and existed between defendant and his mother. So well defined was the relation that he did not rent an acre of ground, reset a fence, sell a crib of corn, or a stack of hay, except under her direction and with her approval. That he received and paid out money for her in conducting her business as we do not doubt, although there is a paucity of testimony in

this regard. In the absence of an express appointment, or acceptance, much may, of course, be inferred as to the nature of a business relationship from the words and conduct of the parties and the correlative circumstances connected with the case. We have weighed all of these in an effort to determine whether the relation which existed between these parties was such as to create a liability on the part of the defendant. The fact that the relation of principal and agent may in form have existed in this case lends no force to plaintiff's claim, unless it be shown that a liability was thereby created on the part of defendant.

"The property, real and personal, belonged to the mother. Her mental alertness and the exercise of her authority in regard to it, shown by the testimony, we have adverted to. The mother being dead, the son's mouth is closed as to the nature of his relations with her, and the evidence in regard thereto, in the absence of other witnesses, must be gleaned from her conduct, so far as it can be shown by all the facts and circumstances in the case. While he acted for her, and she kept a watchful eye upon his actions, she required him to keep no books, and if he accounted to her it must have been orally after each transaction. If he was required to make settlements, the conclusion is almost inevitable that they were made after the same manner as his reports. No syllable of testimony indicates that she was at any time dissatisfied with this manner of proceeding, and it is almost proof positive that if dissatisfaction existed the ever open ears of the village gossip would have heard it from her at some time during the 20 years and more that the relation existed. Under this state of facts, in the utter absence of evidence to sustain it, we are asked by the plaintiff to require the defendant to do what was never required of him by his mother, viz: Render an account of his transactions.

"Living, Mrs. Sarah Kemp may have been unbusinesslike in her methods, but her power to do with her own as she chose cannot be questioned. If she chose to give her income or more to her son in exchange for a home and the companionship of those endeared to her by

association and ties of blood, a court of conscience, whose decrees should be tempered by sentiment as well as a wholesome sense of right, should not interfere with her choice. Especially is this true where, as in this case, there is no allegation of fraud, unfair dealing, or undue influence, and no intimation that she was not, at all times, of sound mind. The plaintiff's petition is to be commended in this respect, as, after the necessary formal allegations, it plants its plea for a decree upon defendant's mismanagement of the estate. In our opinion, the facts and circumstances do not justify equitable intervention. Precedents in support of the conclusion reached here in regard to an accounting may be found in the following cases: *Donovan* v. *Griffith,* 215 Mo. 149, 114 S. W. 621, 20 L. R. A., N. S. 825, 128 Am. St. Rep. 458, 15 Ann. Cas. 724; *Smith, Admr.* v. *Perry,* 197 Mo. loc. cit. 461, 95 S. W. 337; *Crowley* v. *Crowley,* 167 Mo. App. 414, 151 S. W. 512; *Carran* v. *Chapotel,* 47 La. Ann. 408, 16 So. 873; *Evans* v. *Evans,* 42 Tenn. (2 Cold.) 143; *Fidelity T. & T. Co.* v. *Weitzel,* 152 Pa. 498, 25 Atl. 569; *McCarty* v. *McCarty's Admr.,* 11 Ky. Law Rep. 366; *Rich* v. *Austin,* 40 Vt. 416; *Maccauley* v. *Elrod,* 28 S. W. 782, 29 S. W. 734, 16 Ky. Law Rep. 549; *Hamilton* v. *Hamilton,* 15 App. Div. 47, 44 N. Y. Supp. 97, 102; *Robbins* v. *Robbins,* (N. J. Ch.) 3 Atl. 264."

This Barnett case was cited, and quoted from, with approval, by the Supreme Court of Michigan (9-5-39) in the case of *Grand Haven State Bank* v. *Prendergast,* 290 Mich, 206, 287 N. W. 435, where it was held: "Deceased's intimate associate who, before deceased's death, handled deceased's business affairs, would not be required to account, on deceased's death, where no undue influence, fraud, or misrepresentation was exercised on deceased, all expenditures were with deceased's consent and approval, and satisfactory accountings had been made to deceased from time to time up until his death."

The Supreme Court of Oklahoma in the case of *Winter* v. *Klein-Schultz,* (1-18-38) 182 Okla. 231, 76 Pac. 2d 1051, also approved and cited this same case.

We conclude, therefore, that on direct appeal, the decree should be and is reversed and the cause is dismissed. On cross appeal, the decree is affirmed.

The Chief Justice dissents.

GRIFFIN SMITH, Chief Justice, (dissenting). Under fuller facts than those appearing in the majority opinion, I dissent, agreeing with the Chancellor that an accounting should be made.

The statement that Mrs. Singer, by her will of June 2, 1944, ". . . . gave her husband $100,000 in cash . . ." is incomplete. The essential part of Item II reads: "It is my will and desire that my husband shall receive from me during my lifetime or from my estate after my death, a total sum of $100,000. In [the] event I have not given to my husband said sum . . . during my lifetime, then I give and bequeath to him such additional sum to be paid from my personal estate as when added to the sum, or sums, given to him during my lifetime, will total the said sum of $100,000."

Here, it seems, is a clear expression of Mrs. Singer's intent that the husband should be accountable for any moneys he had handled for her, other than incidental bounties mentioned in the will, and not questioned. All of the evidence shows that appellant had received substantially more than the hundred thousand dollars.

To me it seems illogical that we should add a judicial post script to the will, the effect of which is to hold that while Mrs. Singer was rational in all respects affecting testamentary capacity, and that undue influence was not exercised, still she really didn't mean what is so clearly shown.

On the main issue of a full accounting I am not prepared to express an opinion. Certified public accountants made partial findings from which the Chancellor drew conclusions and rendered judgment for $18,910.74. I do not think any one, situated as we are, can (in the limited time the case has been under submission and without neglecting other work) say that in point of mathematical computations there was error. We must

presume—and the result indicates—that the Chancellor spent whatever time was necessary to a consideration of the involved details. Before affirming or denying the result he reached, an appreciable period of time would be required for making a "set-up" from the record and checking thousands of entries, item by item. Since the majority finds that the testatrix did not intend that appellant should account for the money he handled for her, but that all such transactions were gifts, irrespective of the limitation of $100,000 fixed in the will, I express no opinion regarding what should be due.

PHOENIX ASSURANCE COMPANY, LTD. *v.* LOETSCHER.

4-8779 219 S. W. 2d 629

Opinion delivered April 4, 1949.

Rehearing denied May 9, 1949.

 [redacted]

John M. Lofton, Jr., and *Owens, Ehrman & McHaney,* for appellant.

T. J. Gentry and *D. D. Panich,* for appellee.

MINOR W. MILLWEE, Justice. In June, 1946, appellees, Raymond P. Loetscher and Charles H. Loetscher started construction of a building on the Base Line Road in a rural community west of the City of Little Rock. They planned to use the building in the operation of a garage for the repair of motor vehicles. In order to secure a loan from the Reconstruction Finance Corporation to complete construction of the building, appellees were required to procure insurance against the perils of fire, tornado and lightning. On January 22, 1947, appellant, Phoenix Assurance Company, Ltd., issued its policy to appellees against these perils in the principal sum of $12,000. The building was nearing completion when it collapsed or was destroyed during a rain and thunder storm about 4:30 or 5:00 a. m., October 18, 1947.

Appellees' claim for loss of the building by lightning was denied and they filed this suit on December 5, 1947, alleging issuance of the policy, payment of the premium of $118.20 and total destruction of the building by lightning on October 18, 1947. It was further alleged that the building was of the value of approximately $20,000 at the time of its destruction and judgment was prayed for $12,000, plus the statutory penalty of 12% and attorney's fee.

On December 24, 1947, appellant answered admitting the issuance of the policy and that it was in force as alleged in the complaint, but denied all other allegations therein. On February 18, 1948, appellant filed an amendment to its answer pleading that the policy contained a "Full Completed Value Contribution Clause" which provided that the company was liable for no greater proportion of the loss than the amount of insurance bore to 100% of the actual value of the building when fully completed and ready for occupancy.

A second amendment to the answer was filed April 12, 1948, specifically denying that the building had been totally destroyed and alleging that if appellee should recover any amount, it should be limited to 12/20 of the amount of damage to the building as it existed on the date of its destruction. On April 19, 1948, appellant withdrew its first amendment to the answer.

The issues were tried before a jury resulting in a verdict for appellees for $12,000 for which judgment was rendered together with 12% penalty and attorney's fee of $1,800.

The building in question was 125 feet long and 60 feet wide with walls of concrete blocks and brick and a metal roof supported by steel trusses 60 feet in length and extending crosswise from wall to wall. Construction of the building was under the supervision of Henry Buddenburg, appellees' uncle, who was an experienced builder, but not an architect or engineer.

Appellees presented one witness who testified that he saw lightning strike and demolish the building during the storm on the morning in question. Other witnesses who lived nearby heard a violent clap of thunder and the noise of the falling building. Much of the testimony offered by appellant was directed to the type of materials and construction used and several experts gave it as their opinion that the building collapsed because of faulty materials and improper construction. Thus a disputed question of fact was presented to the jury as to the cause of the destruction of the building and the issue was resolved in favor of appellees.

Appellant first contends that the evidence is insufficient to support a finding by the jury that the building was totally destroyed and that the trial court, therefore, erred in submitting this issue to the jury. Appellant says: "It is our contention here that the uncontradicted and only testimony clearly proved that certain portions of the building remained which could be used for the reconstruction of the building, and that there was, therefore, not a total loss. Under these conditions the court should have instructed the jury that appellees could not

recover the full amount of their policy of insurance and should have instructed them to determine the value of those portions of the building remaining and make the appropriate calculation under the provisions of the policy or permit the court to make the calculations after determining the extent of the loss."

The court gave Instructions 1 and 2 requested by appellees as follows: "Instruction No. 1—You are instructed that the burden of proving that said building being constructed by the plaintiffs and insured by the defendant was struck by lightning and as a result thereof was totally demolished is upon the plaintiffs, and if you find from a preponderance of the evidence in this case that the building was struck by lightning, and it was so far destroyed that no substantial portion remains in place capable of being utilized to advantage in restoring the building in the condition in which it was before being struck by lightning, then the building is a total loss. Whether or not the remnant of the building, if any remains, is adapted to use to restore the building to its condition before being struck by lightning depends on whether a reasonably prudent owner, uninsured, desiring to construct such a building as the building was before being struck by lightning, in proceeding to restore the building to its original condition, would utilize the remnant.

"Instruction No. 2—You are instructed that the terms of the insurance policy issued to plaintiffs by the defendant covers the construction of the building described in said policy of insurance, and until fully completed or occupied in whole or in part, said policy of insurance was in full force and effect. If you find from a preponderance of the evidence in this case that said building was demolished as a direct result of being struck by lightning prior to its completion or occupancy in whole or in part, your verdict will be for the plaintiffs."

Appellant objected generally to the giving of Instruction No. 1 and specifically to Instruction No. 2 on the ground that it afforded no basis upon which to fix the amount of a verdict for partial destruction of the building. While appellant did not request an instruction

confining the jury's consideration to partial destruction of the building, the court gave appellant's requested Instruction A, as follows: "If you should find that the plaintiff is entitled to recover in this cause and in addition you should further find that the building was not a total loss, but that there was some value remaining, you will answer the following interrogatories: 1. What is the actual completed value of the building? 2. What is the value of the salvage, if any, that you find remains after the destruction of the building?

The three instructions, when considered together, correctly stated the applicable law as declared by this court in *St. Paul Fire & Marine Ins. Co.* v. *Green,* 181 Ark. 1096, 29 S. W. 2d 304, and *The Home Insurance Co. of N. Y.* v. *Cole,* 195 Ark. 1002, 115 S. W. 267. However, appellant urges that the uncontradicted proof showed a remnant of the structure remaining which was reasonably adaptable to use in restoring the building to its former condition.

The policy did not cover the cost of concrete foundations or supports which are below the surface of the ground in a building constructed without a basement. There was no basement in the building erected by appellees. Testimony on behalf of appellees was that portions of the walls standing after collapse of the building were cracked and would have to be removed and rebuilt; that it would cost more to remove and clean the concrete blocks and brick than it would to purchase new materials; and that there was nothing in the remnants of the wrecked building from the foundation up that a prudent builder would use in restoring the structure.

There was a concrete floor or fill four inches thick laid over gravel estimated by a witness for appellant to have cost $1,750. Appellant earnestly contends that this was a finished floor which was covered by the policy and adaptable for use in restoring the building. Witnesses for appellees referred to this part of the structure as a concrete fill, or foundation, for the floor. Henry Buddenberg, the contractor, testified that this fill lacked four inches reaching the level of the highway or lot surface and that it was their plan to add four inches of

concrete to the fill and put a thinner on top to bring it up to the level of the highway. Appellees gave similar testimony. The cost of this part of the structure was not included in the itemized statement introduced by appellees showing a total of $16,942.46 in the costs of labor and materials used in the construction of the building at the time of its collapse. We think this evidence, considered in the light most favorable to appellees, was sufficient to support a finding that this part of the structure constituted a part of the foundation for a floor which was below the surface of the lot. Hence, it was not covered by the terms of the policy and any ambiguity in the exclusion clause is to be construed strictly against the insurer and liberally in favor of the insured under our well established rule of interpretation of insurance contracts. While the evidence on the whole was conflicting as to whether or not the remnants covered by the policy were capable of being utilized to advantage in restoring the building to its former condition, it was sufficient to support the verdict for total loss of the building.

Since the jury found there was a total loss, it is unnecessary to consider the contribution clause relied on by appellant. Under our Valued Policy Statute (§ 7720, Pope's Digest) an insurance company is liable, in case of total loss, for the full amount stated in the policy, or the full amount upon which it collects a premium. *St. Paul Fire & Marine Ins. Co.* v. *Green, supra; Firemen's Insurance Company* v. *Little,* 189 Ark. 640, 74 S. W. 2d 777, and cases there cited.

A second ground for reversal relied on by appellant, and strongly urged in the oral argument, is that the court erred in refusing to declare a mistrial when it was discovered that Paul Lyons, one of the jurors, was disqualified and incompetent to serve on the jury. It is contended that the juror deliberately and intentionally failed to disclose his knowledge of the facts of the case upon his *voir dire* examination and that appellant was thereby prevented from exercising his right of peremptorily challenging said juror.

During the course of the trial, and before appellees had completed their testimony in chief, the jury was directed to view the wrecked building at the request of appellant. After the usual instructions had been given, the juror, Paul Lyons, asked the court, "Do you have to go out there, if you have already seen it?" The juror was then thoroughly examined by counsel for both parties and stated that he had seen the collapsed building 15 or 20 times in passing it on visits to his parents who resided on the Base Line Road one-half mile beyond the building; that he knew none of the parties to the law suit and did not realize that it involved the building he had seen until they commenced talking about "Base Line Road" (it is not shown whether this occurred in the opening statement of counsel or the testimony of the witnesses); that on visits to his parents he had heard the rumor that the building was struck by lightning; that he had never discussed the case with anybody and did not know there was such a case; that he had not formed or expressed any opinion as to the cause of the destruction of the building and could render a verdict based solely on the law and evidence; and that he did not know any of the people residing in the community except his parents and one of their neighbors.

Appellant also introduced Lewis B. Mize who lived in the community and had appeared as a witness for appellees. He testified that he had known Mr. Lyons 4 or 5 years and had patronized the juror's barber shop a few times more than a year before the trial. On these occasions he had work done by another barber there with whom he was acquainted and he had never "discussed things" with Lyons. Lyons was not asked whether he knew Mize but had stated that the only people he knew in the community were his parents and one of their neighbors.

The bill of exceptions does not contain the *voir dire* examination of the jurors nor the number of challenges exercised by either party, if any. The challenged juror did not sign the verdict, which was returned by only nine jurors. We have frequently held that it is within the trial court's discretion to set aside a verdict when

objection is made for the first time after rendition of the verdict. The same rule of discretion is applied as to the right of the court to discharge the jury or declare a mistrial during the trial. 50 C. J. S., "Juries," § 291. In *Fones Brothers Hdw. Co.* v. *Mears,* 182 Ark. 533, 32 S. W. 2d 313, this court upheld the action of the trial court in refusing to grant a new trial on account of the disqualification of a juror by reason of relationship to one of the parties where the bill of exceptions did not disclose that any questions were asked on the *voir dire* examination as to relationship of the juror to the parties, and it was not shown that diligence was used to ascertain such disqualification.

Appellant relies on the case of *D. F. Jones Construction Co.* v. *Fooks,* 199 Ark. 861, 136 S. W. 2d 487. It was there held that appellants were entitled to a new trial on the ground of newly discovered evidence where it was shown that two of the jurors, previous to the trial, were offered bribes to return a verdict for the appellee and had failed to disclose the offer when questioned on their *voir dire* as to whether or not they had been talked to by anyone relative to the case.

Since there is no record of the *voir dire* examination in the case at bar, we would have to indulge in speculation, which is not borne out by the facts subsequently developed, to say that Mr. Lyons was intentionally evasive and prompted by bad faith in answering questions touching his qualifications to serve as a juror. After the juror voluntarily disclosed the fact that he had seen the collapsed building, he made frank and straightforward answers to all questions. In viewing the cold record we find it insufficient to support the conclusion that he was actuated by improper motives and the trial judge was in much better position than this court to determine the juror's qualifications; he could observe the mannerism and hear the answers of the juror. In *Rumping* v. *Ark. National Bank,* 121 Ark. 202, 180 S. W. 749, the court said: "The decision of the trial judge upon the question of a juror's qualification must necessarily rest largely in the exercise of sound discretion, and the decision should not be set aside unless it clearly appears that

there has been an abuse of discretion and that a biased juror has been forced upon the parties.'' We cannot say that the trial court abused his discretion in refusing to declare a mistrial under the facts and circumstances presented here.

The judgment is affirmed.

HOLT, J., (dissenting). I respectfully dissent. I think the trial court committed reversible error when it refused appellant's request, made in apt time, for a mistrial when it was discovered that Juror Lyons, on his voir dire after the trial court had reviewed the issues which the pleadings presented and had interrogated this juror, as well as all others, whether he knew any of the facts and circumstances connected with the particular case and had answered in the negative, and in addition, after counsel for appellant and appellee had likewise questioned this juror and the others, and especially whether any of them had discussed the case, all answered in the negative when in fact Juror Lyons was familiar with many of the pertinent facts and had discussed the case with others. All the jurors were also asked whether they knew about what caused the destruction of the property involved or the parties to the litigation and a negative answer was given following the questions propounded.

The attorneys for the parties exercised the three peremptory challenges afforded them (§ 8346, Pope's Digest) and the jury was selected.

Near the close of the trial, it was discovered that Juror Lyons had actually viewed the building on many occasions subsequent to its collapse, was a friend of one the principal witnesses for appellees, had discussed the case with certain people in the community, had been informed that the building had been destroyed by lightning, and that his mother and father had for many years been neighbors of appellees, none of which, as indicated, he divulged upon his voir dire.

Upon appellant's request for a jury view of the building in question near the close of the testimony, the request was granted, and while the court was giving the

usual instructions to the jury to guide them while viewing the property, Juror Lyons arose from his seat in the jury box and asked of the court: "Do you have to go out there if you have already seen it?" He was then asked: "How frequently have you viewed this scene?" and he answered "Twenty-fifteen times."

Appellant argues that had he known these facts he would not have accepted Lyons as a juror.

Our jury system is hoary with age and is the best yet devised by man. Our Federal and State Constitutions guarantee to every person a fair and impartial trial before a jury of his peers.

In the circumstances, I do not think appellant has had that fair and impartial trial which was his right, in the present case.

"Full knowledge of all material and relevant matters is essential to a fair and just exercise of the right to challenge either for cause or peremptorily, and it is the duty of a juror to make full and truthful answers to such questions as are asked him, neither falsely stating any fact nor concealing any material matter. If he falsely misrepresents his interest or situation, or conceals a material fact relevant to the controversy, he is guilty of misconduct, and such misconduct is prejudicial to the party, for it impairs his right to challenge." 31 Am. Jur., § 108, p. 638.

The fact that Juror Lyons did not sign the verdict along with the nine who did sign it, it seems to me could make no difference. The fact remains that appellant was entitled to fair, frank and honest answers to the questions propounded before accepting him as a juror. It is undisputed that these answers he did not get. No one knows just what influence this juror exerted in the jury room or during his association with the jurors in this case. Whether his influence was exerted for or against appellant, we cannot know and we should not be required to speculate on this question. The record reflects that the trial court stated, when it refused to grant appellant's request for a mistrial, that it was an embarassing

situation due to his personal acquaintance with Juror Lyons.

While there was no intimation or accusation of fraud on the part of this juror, I think he was disqualified and a mistrial should have been declared.

In *D. F. Jones Construction Company, Inc.*, v. *Fooks*, 199 Ark. 861, 136 S. W. 2d 487, this court said: "The jury system is a great institution and should hold itself aloof from any and all corrupt influences. Members of juries owe it to themselves and to the great system to preserve the integrity of their verdicts. If there is substantial evidence in the case to support the verdict of the jury this court will not try a case de novo, but will accept and receive the verdict of the jury as final on issues involving not only property rights, but issues involving life and death. The only way to preserve the integrity of the verdicts of juries and keep the stream of justice pure is to set aside verdicts returned by juries which have been tampered with or attempted to be tampered with. * * *

"We think this is a most wise rule and adopt it as the rule in this state irrespective of whether such third persons are interested in the case or whether their attempts are sanctioned by the parties litigant or their attorneys. This court will not affirm a judgment on a verdict returned by a jury which has been tampered with or unduly influenced by parties litigant or by third persons. We regard this rule as necessary to inspire the confidence of the body politic in the jury system and in order to preserve the integrity of verdicts rendered by juries. The trial court should have sustained the second motion for a new trial and granted same."

"Verdicts returned by a jury where any member thereof had publicly expressed his opinion that the party charged was guilty of the crime and where this information was withheld from the court and the party charged with the crime by him at the time he qualified to sit upon the jury should not be upheld by the courts. Nothing can destroy the integrity of juries more effectively than to allow prejudiced jurors to sit in a case. The courts

should jealously preserve the integrity of juries." *Anderson* v. *State,* 200 Ark. 516, 139 S. W. 2d 396.

I think, therefore, that the judgment should be reversed and the cause remanded for a new trial.

WOOLFOLK *v.* McDONNELL COMPANY.

4-8797 219 S. W. 2d 223

Opinion delivered April 4, 1949.

Talley & Owen and *Robert L. Rogers, II,* for appellant.

Reinberger & Eilbott, for appellee.

ROBINS, J. Appellant sought in the lower court to be adjudged owner, as tenant in common with appellee, of an undivided one-sixth interest in a 280-acre farm in Jefferson county, and to have partition and an account-

ing as to rents. From a decree dismissing his complaint for want of equity appellant prosecutes this appeal.

The land involved was owned in his lifetime by S. L. Woolfolk, who died intestate in 1934. Woolfolk had six children, of whom appellant was one. S. L. Woolfolk had executed a second mortgage on the land to appellee, The McDonnell Company, to secure an indebtedness which amounted on February 22, 1936, to $11,702.81. T. N. Woolfolk was appointed administrator of the estate of S. L. Woolfolk, deceased.

Appellee filed suit on February 22, 1936, to recover judgment on its debt and to foreclose its mortgage and made as defendants the administrator of the mortgagor's estate and all of his heirs, including appellant.

It is appellant's contention that he was not served with summons in that suit and that the decree of foreclosure rendered therein on November 3, 1936, as well as subsequent sale and conveyance by a commissioner appointed by the court, was therefore ineffective as to his inherited share of the land. A summons, introduced in evidence, shows service on certain of the heirs of S. L. Woolfolk in Jefferson county, and a "*non est*" return as to appellant, the sheriff stating in the return that he was advised that appellant was in Little Rock. Other heirs were summoned by warning order.

It was shown that on September 19, 1936, the lower court made an order appointing a receiver to take charge of the land and this order recites: "The court finds that reasonable notice of this hearing has been given to *the defendants.*" (Italics supplied).

Appellant testified that he first learned of the foreclosure suit in August, 1937; that at that time he talked to Mr. McDonnell, president of appellee company; "I asked him if it was possible that we could redeem the land"; that the foreclosure decree had already been rendered at that time.

W. A. McDonnell, president of appellee company, testified that after the foreclosure suit was filed appellant came to his office at Little Rock several times to ask postponement of the suit in order to give him and

other defendants time to raise the debt; that appellant had full knowledge of the suit; that appellant discussed the suit with him several times before the decree and also afterward, on each occasion wanting to repurchase with a small down payment.

Howard L. Hunter testified that during the foreclosure proceedings against the Woolfolk property he was manager and secretary of appellee company; that appellee has been in possession of the land since foreclosure and that appellant knew of it; that appellee had made improvements on the land; that he remembered about appellant coming to see him and talking to him about re-financing the debt and that this occurred before and after the decree of foreclosure was rendered.

In the decree of foreclosure no mention of appellant is made, though manner of service of process against each of the defendants, other than appellant, is described, but the decree contains this recital: "That all of the defendants have been personally or constructively summoned." By the terms of the decree appellee company was given judgment against the administrator for the amount of the debt; and a foreclosure of the lien of the mortgage was ordered in the usual manner, the land being described in the decree, with no mention of any interest therein, less than the whole, being ordered to be sold.

The instant suit was filed on January 14, 1947.

While appellant testified that he did not learn of the foreclosure proceeding until in 1937, the year after the decree was rendered, there was abundant evidence to justify the lower court in finding that appellant knew of the foreclosure suit *before* the decree was rendered. Appellant was all the while living in Little Rock, and his brother, the administrator, and other members of the family served with summons, were living in Jefferson county. It is difficult to believe that appellant was not fully cognizant of the pendency of the suit, as the testimony on behalf of appellee shows that he was.

Appellant cannot be heard to say that he did not understand that his interest in the land was involved in

the foreclosure. He was made a party to that suit, and this fact was sufficient to put him on notice that an attempt was being made to foreclose his interest. Furthermore, the administrator of the estate of S. L. Woolfolk, deceased, was made a party and a judgment rendered against this administrator which would have authorized a sale of the land being made under order of the probate court. Appellant was thus put on notice that a sale of the entire interest—not merely a five-sixth interest therein—was being sought by appellee.

Appellant waited for more than nine years after he knew of the suit to which he was a party, and for more than nine years after appellee received a deed conveying to it the land—during which period appellant has been excluded from possession and from enjoyment of any part of the rents—before he asserted his right to any interest in the land. While ordinarily the possession of one tenant in common is not adverse to the rights of another tenant in common, this principle does not help the position of appellant because it was shown that the possession of appellee has all the while been under a claim of entire and exclusive ownership. *Hill* v. *Cherokee Construction Company,* 99 Ark. 84, 137 S. W. 553; *Jones* v. *Morgan,* 196 Ark. 1153, 121 S. W. 2d 96. Even if we assume—as appellant contends—that appellant became a co-tenant with appellee upon the completion of the foreclosure, nevertheless there are ample facts in the record here to support the chancery court's decree that appellant is barred. The facts here bring this case within the rule of such cases as *Landman* v. *Fincher,* 196 Ark. 609, 119 S. W. 2d 521; *Wilson* v. *Storthz,* 117 Ark. 418, 175 S. W. 45; and *Parsons* v. *Sharpe,* 102 Ark. 611, 145 S. W. 537.

The decree of the lower court is affirmed.

4-8812 219 S. W. 2d 225

Opinion delivered April 4, 1949.

[redacted]

Robert J. Brown, for appellant.

Fred A. Snodgress, for appellee.

MINOR W. MILLWEE, Justice. Appellee, Walter Nash, brought this action in unlawful detainer against appellant, Mrs. J. B. Hastings, and recovered judgment for possession of the property together with rents in the sum of $361.67. This appeal follows.

The following facts are stipulated. Appellant has occupied the premises belonging to appellee for a number of years on a month to month rental basis, the monthly rental period being from the 7th of the month to the 7th of each succeeding month, and all rents have been paid promptly. Having complied with O.P.A. regulations, appellee on August 9, 1946, gave appellant written notice to vacate the premises not later than November 9, 1946.

It further appears from the record that appellant still occupied the premises on March 27, 1947, when the instant suit was filed after a three-day written notice

to quit had been served on appellant on February 22, 1947, pursuant to Ark. Stats., (1947), § 34-1503.

The issue here is the sufficiency of the notice served on appellant on August 9, 1946, to vacate the premises not later than November 9, 1946. We have no statute regulating the length of notice required to terminate a tenancy from month to month and are, therefore, governed by the common law rule, which is stated as follows in *Dillon* v. *Miller,* 207 Ark. 401, 180 S. W. 2d 832: "In the absence of an agreement between them providing otherwise, either the landlord or the tenant may terminate a monthly tenancy by, and only by, giving the other party thirty days written notice of his election to so terminate it, 'the notice ending with a monthly period.' *King* v. *Solmson,* 188 Ark. 237, 65 S. W. 2d 19; *Peel* v. *Lane,* 148 Ark. 79, 229 S. W. 20; *Reece* v. *Leslie,* 105 Ark. 127, 150 S. W. 579; *Stewart* v. *Murrell,* 65 Ark. 471, 47 S. W. 130; *Fizzell* v. *Duffer,* 58 Ark. 612, 25 S. W. 1111." The exact holding in the Dillon case, *supra,* is stated in Headnote 2, as follows: "Where the landlord undertakes to set forth in the notice the exact day on which possession of the premises should be delivered up, the day so designated may properly correspond with either the first or the last day of the rental period."

It is noted that the notice in the instant case did not set forth the exact day upon which possession was to be yielded but provided that appellants should vacate "not later than" November 9, 1946. The words "not later than" were held to be synonymous with "at any time prior to" in *Hughes* v. *U. S.,* (C. C. A. Tenn.) 115 F. 2d 285. It is held generally that a tenant cannot complain that he is given longer notice to quit than the law requires. 32 Am. Jur., Landlord and Tenant, p. 840. In *Boss* v. *Hagan,* 49 App. D.C. 106, 261 F. 254, 8 A. L. R. 1508, the court held that the fact that the notice gave the tenant a day following the date of the recurring date of the holding to vacate did not render the notice invalid. It has also been held that a mistake in fixing the date of the termination of a tenancy which does not mislead or harm the other party will not invalidate the notice. *Gulley* v. *Mayo,* 191 Miss. 143, 1 So. 2d 800.

At the time of the filing of the instant suit, appellant had withheld possession of the premises from appellee for more than four months following the expiration of the notice to vacate. Three recurring rental periods expired between the date of the giving of the notice and its termination and there is nothing in the record to indicate a waiver of the terms of the notice on the part of appellee. Under these circumstances, it is the opinion of the majority, in which Justice GEORGE ROSE SMITH and the writer do not concur, that appellant is in no position to contend that the notice to vacate was insufficient.

Affirmed.

MCFADDIN, J., concurs.

NEWSOM *v.* GLAZE.

4-8765 219 S. W. 2d 232

Opinion delivered April 4, 1949.

Kenneth C. Coffelt, for appellant.

J. H. Lookadoo, for appellee.

ED. F. MCFADDIN, Justice. A traffic collision between approaching vehicles resulted in this litigation. The plaintiff Glaze was driving west, and the defendant Newsom was driving east; and the left front portion of

plaintiff's car struck, or was struck by, the left side of defendant's car. In the ensuing litigation the plaintiff testified that the defendant's car traveled over the center line to the plaintiff's side of the road and "sideswiped" plaintiff's car; the defendant testified that the plaintiff's car traveled over the center line to the defendant's side of the road, and struck the defendant's car. The jury accepted the plaintiff's version, and from the verdict and consequent judgment defendant brings this appeal. He urges for reversal: that the undisputed physical facts are susceptible of only one conclusion, and definitely prove that the plaintiff's testimony is unworthy of belief.

It is admitted by the defendant that there is sufficient evidence to sustain the verdict of the jury, unless the physical facts prevail as a matter of law; but it is most earnestly insisted that certain physical facts establish the defendant's case and necessitate reversal of the jury's verdict. Learned counsel for defendant invoke the rule that a verdict will be set aside if it be against incontrovertible physical facts; and in support of that rule he cites *St. L. S. W. Ry. Co.* v. *Ellenwood,* 123 Ark. 428, 185 S. W. 768; *Waters-Pierce Oil Co.* v. *Knisel,* 79 Ark. 608, 96 S. W. 342; *Platt* v. *Owens,* 183 Ark. 261, 35 S. W. 2d 358; *Magnolia Petroleum Co.* v. *Saunders,* 193 Ark. 1080, 104 S. W. 2d 1062. To these cases might well be added: *Aldread* v. *Mills,* 211 Ark. 99, 199 S. W. 2d 571; and *Mo. Pac. R. Co.* v. *Diffee,* 212 Ark. 55, 205 S. W. 2d 458. See, also, the following: 3 Am. Juris. 451, 4 C. J. 861, 5 C. J. S. 631, and note on page 640; 46 C. J. 183; and the annotation in 21 A. L. R. 141 on "Evidence contrary to scientific principles or laws of nature."

With the rule of our cases in mind, defendant lists seven physical facts which he claims (a) to be undisputed and (b) to prove beyond controversy that the collision occurred on the defendant's side of the highway. We quote from defendant's brief:

"The physical facts that show positively and conclusively that Glaze is clearly and palpably wrong, and that the verdict shocks the sense of justice, are:

"1. When two cars run together, one of them traveling fifty miles per hour, knocking its front wheel and fender down, and damaging the rear of the other car, some physical signs at the place of impact will be left to tell the tale.

"2. All of the glass, rim signs, and dirt from the cars were at the point along the road where Newsom said he got hit.

"3. There is not a single sign of the collision across the road where Glaze said he was struck, or on any portion of the road close by.

"4. Newsom's car was struck at the left rear wheel and knocked off the road and stopped facing west.

"5. The left front wheel and fender of Glaze's car was the part damaged.

"6. The position and trail left by Glaze's car after the collision establish the positive truth of Newsom's statement.

"7. The admitted speed of the Glaze car makes it impossible for his version to be correct."

Even though the foregoing list appears formidable, nevertheless, those seven points are far from being undisputed. For instance: (a) the speed of the car was disputed; (b) the broken glass alleged to have been found near the scene of the collision was never shown to have been broken from either car; (c) the only marks or signs of the collision testified to by any witness were some on the *gravel shoulder* of the road; and (d) one of the witnesses (a minister) testified that there were no marks or signs at the scene where the collision took place. Thus, some of the seven "physical facts" offered by the defendant were not established by affirmative evidence, and it is only when the physical facts are "incontrovertible" that they may be used as a basis to impeach the jury verdict.

When we lay aside—as we must—the controvertible physical facts, we have these left: (a) the damage to each car (that is, the left front of the plaintiff's and the

left side of the defendant's); (b) the course of the vehicles after the impact; and (c) the final stopping place of each car. These three physical facts are not sufficient to establish defendant's contentions in the face of the jury verdict. Regardless of the exact point of the collision on the highway, there could have been the same damage, the same resulting course of the vehicles, and the same final stopping place of each car. In *Aldread* v. *Mills,* 211 Ark. 99, 199 S. W. 2d 571 we had a case similar to the one here, and what was said in that case in regard to such physical facts is applicable to the case at bar. We apply here what we there quoted from *Lang* v. *Mo. Pac. R. Co.,* 115 Mo. App. 489, 91 S. W. 1012:

" 'So frequently do unlooked-for results attend the meeting of interacting forces that courts, in such cases, should not indulge in arbitrary deductions from physical law and fact, except when they appear to be so clear and irrefutable that no room is left for the entertainment, by reasonable minds, of any other.' "

It is not for us to substitute our conclusions for those of the jury, unless the incontrovertible physical facts demonstrate beyond a doubt that the verdict was erroneous. We cannot so declare in this case. Affirmed.

RODGERS *v.* HOWARD, JUDGE.

4-8592 219 S. W. 2d 240

Opinion delivered April 4, 1949.

W. C. Rodgers, for petitioner.

Per Curiam. This is an original proceeding in this Court, and embraces three separate motions filed by the same party, each seeking a writ of *procedendo ad judicium.*

The petitioner here is the plaintiff in an action pending in the Circuit Court of Howard county against the Campbell Soup Company. The respondent is the Judge of the Ninth Judicial Circuit, which includes Howard county; and the prayer of each motion is that this Court require the respondent to adjudicate petitioner's case in the Circuit Court. We forego any discussion of (1) the history and original functions of the writ of *procedendo ad judicium,* and (2) whether the writ under our present Code practice should be styled under another name; because this Court, under our Constitution (Art. VII, § 4) has supervision over all inferior courts, and we consider that by whatever name the petition here is styled, consideration of the relief sought by the petitioner is within our constitutional power.

On November 7, 1947, petitioner filed his complaint in the Howard Circuit Court against the Campbell Soup Company alleging it to be a corporation organized under the Laws of New Jersey, and domiciled in that State.

The complaint sought judgment *in personam* against the defendant.

I. *First Attempted Service.* Service on the defendant was attempted under § 1374, Pope's Digest—*i. e.,* by serving summons on the corporation officers at its home office in New Jersey. When the Circuit Court (under the authority of § 8226, Pope's Digest) held such service insufficient to support a judgment *in personam,* the petitioner filed in this Court on March 29, 1948, his first motion for writ of *procedendo ad judicium.* We denied that motion by a *per curiam* order of April 12, 1948.

II. *Second Attempted Service.* Petitioner then had a summons against the Campbell Soup Company served on the Secretary of State of Arkansas,[1] based on the premise that, under Act 347 of 1947, the Campbell Company was capable of being sued in actions *in personam* in this State. Unless said Act 347 of 1947 is applicable, then this service must also fail. The Circuit Court held this service to be insufficient, and petitioner then filed in this Court—on June 26, 1948—his second motion for writ of *procedendo ad judicium.* Attached to that motion there is what purports to be the evidence heard in the Circuit Court, and on which the Court held the service to be deficient.

Assuming, but not deciding, that this evidence is properly before us, and that this is the appropriate method for presenting the issue, the transcript reflects that a traveling salesman of the Campbell Soup Company solicited orders from the Stuart Grocery Company in Nashville, Arkansas; that such orders were forwarded by the salesman to the home office of the Campbell Soup Company in New Jersey for acceptance or rejection; that sometimes the Stuart Grocery Company sent its orders direct by mail to the Campbell Soup Company in New Jersey; that upon acceptance of any order by the Campbell Company at its home office in New Jersey (whether the order was obtained by the salesman or sent direct by mail as aforesaid), the shipment from the

[1] Summons was also served on the State Auditor under § 2250, Pope's Digest.

Campbell Soup Company to the Stuart Grocery Company was packed, marked, and duly identified as for that party, and placed in a railroad *carload* shipment containing goods for distribution to other purchasers in the Nashville freight territory; that the entire carload moved by rail from New Jersey to the Hunter Transfer Company at Texarkana, Arkansas; that this last-mentioned concern opened the car and then sent to the Stuart Grocery Company its shipment and likewise sent other purchasers their shipments from the said railroad car. In short, the Hunter Transfer Company broke the shipment to less-than-carload lots—all of which was evidently a freight saving device. Stuart Grocery Company paid direct to Campbell Soup Company in New Jersey.

Because of the activities of the Hunter Transfer Company in Texarkana, Arkansas, petitioner claims that the Campbell Soup Company was doing business in Arkansas, and therefore capable of being brought into the Arkansas courts by service of process on the Secretary of State under Act 347 of 1947, or service on the State Auditor under § 2250, Pope's Digest. The cases of *Crawford* v. *Louisville Silo & Tank Co.,* 166 Ark. 88, 265 S. W. 355 and *Citizens Union National Bank* v. *Thweatt,* 166 Ark. 269, 265 S. W. 955 are authority for our holding against petitioner's contention. In those cited cases, just as here, a non-domesticated foreign corporation accumulated several shipments into one carload shipment to an Arkansas point, where an agent of such corporation distributed the individual shipments to the various purchasers; and we held that such shipments were inter-state commerce and did not constitute "doing business" in Arkansas by the foreign corporation within the purview of our statutes.

Act 347 of 1947 was before this Court in the recent case of *Gillioz* v. *Kincannon,* 213 Ark. 1010, 214 S. W. 2d 212, and reference is made to that opinion for a discussion of the said Act. Petitioner claims that Act 347 of 1947 changed the rules of law announced in the Crawford-Louisville and Citizens Bank-Thweatt cases, *supra,* and petitioner urges that the said Act allows the Campbell Company to be sued in a case such as this one, since (1)

Hunter Transfer Company was the agent of the Campbell Company to break and subdivide the carload shipment, and (2) such act by the Hunter Transfer Company was done and performed in the State of Arkansas.

This contention seeks to pose the difficult question as to the applicability of the rule announced by the U. S. Supreme Court in such cases as *International Shoe Co.* v. *Washington,* 326 U. S. 310, 90 L. Ed., 95, 66 S. Ct. 158, 161 A. L. R. 1057; *Kentucky Whip & Collar Co.* v. *Illinois C. R. Co.,* 299 U. S. 334, 81 L. Ed. 270, 57 S. Ct. 277; and *Standard Dredging Co.* v. *Murphy,* 319 U. S. 306, 87 L. Ed. 1416, 63 S. Ct. 1067. These cases hold (in the language of International Shoe Co. v. Washington, *supra*):

"... that Congress, in the exercise of the commerce power, may authorize the States, in specified ways, to regulate interstate commerce or impose burdens upon it."

The question now becomes, whether a holding by us would be within the rule of such cases, if we should hold that the acts performed by the Hunter Transfer Company for the Campbell Company—even though in interstate commerce—were sufficient to support substituted service in actions *in personam* in the Arkansas courts. We pass this question as one of unnecessary speculation. Whether the Legislature could validly enact such legislation is not for us to decide at this time. We hold that Act 347 of 1947 was not intended to change the rule concerning the breaking of the journey of interstate shipments as announced in the cases of Crawford v. Louisville Silo & Tank Co. and Citizens Bank v. Thweatt, *supra.* Until such a change of the rule in these cases be attempted by the Legislature, we need not speculate on its constitutionality.

Also, without attempting now to delineate the permissible limits to which a State may go in using substituted service as the basis to support a judgment *in personam,* it is sufficient in this opinion to say—and we so hold—that the shipment of the Campbell Company in the case at bar preserved its interstate character until the shipment reached the Stuart Grocery Company in

Nashville, Arkansas, and that the acts of the Hunter Transfer Company, even if it should be said to be an agent of the Campbell Company, were transactions in interstate commerce, and not within the scope or contemplation of Act 347 of 1947. In short, we hold the Crawford-Louisville Silo and Citizens Bank-Thweatt cases to be ruling in the case at bar; and therefore we deny the petitioner's motion filed in this Court on June 26, 1948.

III. *Third Attempted Service.* While there was still pending before this Court the motion involving the second attempted service, the plaintiff in the Circuit Court made further attempts to obtain service on the Campbell Soup Company. He pursued the provisions of § 532, *et seq.*, Pope's Digest, *i. e.*: the plaintiff made affidavit that the defendant was a non-resident; a bond was filed; a writ of attachment was issued; warning order was published; and an attorney *ad litem* was appointed, who duly reported. On the writ of attachment the sheriff made a return that no property of the Campbell Soup Company was found on which to levy the attachment; and, based on such return, the Circuit Court refused to render judgment for plaintiff. Thereupon the petitioner filed in this Court—on February 1, 1949—his third motion for writ of *procedendum ad judicium.* In 7 C. J. S. 388, and in 6 C. J. 213, the recognized holdings are summarized in this language:

"In an attachment suit, where there is no personal service on defendant, a levy or its equivalent is essential to give the court jurisdiction to proceed to judgment, . . ."

Based on the holdings as summarized by the quoted statement, the Circuit Court correctly refused to render judgment for the plaintiff in the attachment proceeding, since there was no property seized upon which to base the attachment.

Conclusion: Each of the motions for writ of *procedendum ad judicium* is denied; and, since we are denying the motions, we reserve the question, whether the petitioner's correct course was to file such motions here, or to appeal from a final order of dismissal.

4545 219 S. W. 2d 421

Opinion delivered April 11, 1949.

W. J. Morrow, for appellant.

Ike Murry, Attorney General and *Jeff Duty,* Assistant Attorney General, for appellee.

GRIFFIN SMITH, Chief Justice. By information Albert Anglin was charged with stealing a .25 calibre pistol, "revolver type," valued at $15, the property of Albert Horner. The appeal is from judgment on a jury's verdict finding the defendant guilty of petit larceny and fixing his punishment at sixty days in jail and a fine of $300.

At trial it was shown, over appellant's objections, that the pistol once owned by Horner was an automatic. The main contention for a reversal is that ownership of the weapon by Horner at the time it was thought to have been stolen was not established by competent evidence. The trial occurred September 27, 1948.

However, Lee Davidson, whose testimony on cross-examination was not impaired, identified the pistol as one purchased by Horner approximately "two years ago." Davidson was Horner's neighbor and could not be mistaken because the intials "E. O. C." were imprinted on the grip. Directly following Davidson's statement that he was present when Horner "traded for the gun," the witness was asked if he had seen it lately, and answered yes. The next question was, "when did Mr.

Horner die?" A. "Last Saturday night two weeks ago." Davidson had previously testified that after 1946 he visited in Horner's home "every day" and had seen the pistol "hundreds of times."

John Harbottle runs a liquor store at Altus. Silas Harmon testified that after July 10, 1948, he saw Horner's pistol, and called attention to it, presumptively in Harbottle's custody. Harbottle testified that he bought the pistol from Anglin "about mid-September a year ago," and paid $13 for it.[1]

The record is somewhat abbreviated, indicating that incidental facts showing the relationship of Horner and Anglin were mentioned in preliminary statements. For example, the Court remarked to a witness: "You keep saying 'they' pulled [Horner] out of the car! What was wrong with him—sick or drunk? Why *pull* him out: couldn't he get out?" An answer was: "Well, he was drunk, and in the back seat, as it was reported to me. Anglin was driving Horner's car, and [when the car caught on fire] he pulled him out."

When the State rested its case with the testimony of witnesses mentioned, and others who were not informed in respect of the principal issues, appellant moved for a directed verdict on the ground that Horner's ownership of the pistol when it was sold to Harbottle by Anglin was not established, nor was there any evidence it had been stolen. Whereupon the Prosecuting Attorney requested the Court's permission to testify. Anglin, he said, while speaking in the presence of D. B. Bartlett, claimed that he ". . . picked the gun up off the ground the night of the fire as he dragged Horner from the car. He said he helped drag Horner, and as he did so the gun fell to the ground, and he picked it up at the fire." Bartlett testified that Anglin said he "found" the pistol, but did not remember that he said where he found it. Appellant did not testify.

Our view is that if additional testimony supporting the information had not been given after the State rested,

[1] There was testimony that the pistol was of Greek manufacture, and was worth from $15 to $25.

a directed verdict would have been imperative. But it was within the Court's discretion to allow other witnesses to testify if the circumstances were not such as to prejudice the defendant through surprise or otherwise at a time when the disadvantage could not be overcome. No contention of this kind is made. We must, therefore, treat the appeal as properly containing the supplemental evidence.

In this light Anglin is shown to have sold the pistol to Harbottle; and, by his own statements, to have taken it when Horner was helpless. Whether he appropriated the weapon from Horner's personal presence, or picked it up where the owner had dropped it—in either event the presumption of ownership by Horner is something more than speculation.

If appellant's statements to the Prosecuting Attorney be treated as an extra-judicial confession, not sufficient alone to convict, then the rule cited by Judge HART in *Reed* v. *State,* 102 Ark. 525, 145 S. W. 206, is applicable, for declarations or comments made by the accused before or after commission of a crime, "although not amounting to a confession, but from which, in connection with other evidence of surrounding circumstances an inference of guilt might be drawn," are admissible.

Affirmed.

GEORGE ROSE SMITH, J., dissenting. The real question in this case concerns the sufficiency of the evidence to support a conviction when the accused's confession is unaccompanied by other proof that an offense was committed. Appellant was charged with stealing a pistol on July 10, 1947. The State proved that Horner had owned the pistol, that a car burned in the summer of 1947, and that in September of that year the appellant sold the pistol to Harbottle. That was the only foundation laid for the prosecuting attorney's testimony that appellant admitted having picked up the weapon at the fire. This confession was made during the course of an investigation of the crime. Bartlett, mentioned by the majority, was a deputy prosecutor participating in the investigation.

The applicable principles are perfectly well settled. A confession made out of court will not warrant a conviction without other proof that the offense was committed. Ark. Stats. (1947), § 43-2115; *McLemore* v. *State,* 111 Ark. 457, 164 S. W. 119; *Johnson* v. *State,* 198 Ark. 871, 131 S. W. 2d 934. Larceny is defined as the felonious stealing, taking and carrying away of another's property. Ark. Stats. (1947), § 41-3901. The original taking must be felonious; it is not enough to show that the property was taken by mistake or in good faith and later converted when the mistake was discovered. *Wilson* v. *State,* 96 Ark. 148, 131 S. W. 336, 41 L. R. A., N. S. 549, Ann. Cas. 1912B, 339. Here the proof showed merely that Horner had owned the pistol and that appellant sold it some months later. There was not one syllable of testimony indicating that the gun had been stolen by anyone.

It is suggested by the majority that appellant's statement amounts only to an admission and so is not within the scope of the statute. Of course it is well established that an admission of a lesser fact, as distinguished from an admission of the fact of guilt, does not constitute a confession. This distinction could not be better illustrated than by the case of *Reed* v. *State,* relied on by the majority. There Reed was indicted for murder. The State was permitted to prove that while he was in jail awaiting trial he made the statement that he was going to play crazy and try to get bond. That statement was obviously a mere admission which might be considered by the jury with the rest of the proof, especially as Reed pleaded insanity. But here the statement, made in the course of an investigation by the prosecuting attorney, was an out-and-out confession that appellant had taken the property. The only conceivable reason for refusing to recognize it as a confession would be that the appellant neglected to say that he feloniously stole, took and carried away the pistol. A complete answer to any such argument is that ,there not being another particle of evidence that the pistol was wrongfully

taken, the appellant is being convicted either upon his confession alone or upon no evidence whatever.

MILLWEE, J., joins in this dissent.

BAILEY *v.* STATE.

4553 219 S. W. 2d 424

Opinion delivered April 11, 1949.

Ross Robley and *Elmer Schoggen,* for appellant.

Ike Murry, Attorney General and *Arnold Adams,* Assistant Attorney General, for appellee.

GRIFFIN SMITH, Chief Justice. The verdict was: "We, the jury, find . . . John Bailey guilty of rape . . . and assess his punishment at life imprisonment in the penitentiary."

From a judgment responsive to the verdict the defendant's appeal seeks reversal on four grounds: (1) The jury was misled by the Court's reply to questions propounded regarding the right to recommend clemency. (2) A failure to instruct on lower degrees of crime, the only affirmative evidence showing rape, was prejudicial. (3) A preliminary hearing was denied, hence the information should have been quashed. (4) Systematic exclusion of women from jury panels was a denial of due process.

The facts present a sordid picture. Appellant, a married man with one child in esse and another expectant, went with Lee Doyle to a place where beer was sold. Doyle told Bailey he had a "date" with a girl whom he named. Doyle, presumptively at Bailey's request, telephoned his girl friend and asked that she procure a companion for Bailey. As a result of such overtures, Bailey's companion was virtually held prisoner for the night and repeatedly raped.

After patronizing places of incidental amusement the four, in Bailey's car, drove to Boyle Park. During a short stop Doyle and his companion got out and walked to the rear. While they were talking and smoking cigarettes Bailey suddenly drove away, and was not seen again by Doyle that night.

The prosecuting witness, 20 years of age, employed by a Little Rock real estate firm, testified that it was after eleven o'clock when the Boyle Park stop was made, on a dirt or gravel road. Shortly after Doyle and his companion got out of the car, Bailey became aggressive, but discontinued the struggle when it seemed likely the encounter might attract attention. Testimony on this

phase of the assault was: "I screamed and screamed so much that he got up and said, 'I'm sorry: I didn't know you were a nice girl. Come on and we will find the other couple.' " With this comment Bailey drove off, but the prosecuting witness did not know where they went. There were no houses in sight, no lights, or people. The witness then said:

"He stopped and didn't waste any time. He dragged me out of the car, threw me on the ground [on a blanket] and attacked me."

It is not necessary to repeat the details, which established completed rape. The witness said she kept screaming, and that a car approached; whereupon Bailey jumped up and said, 'Come on, let's get back in the car.' Instead of complying with the request, the unfortunate girl ran to the other car and begged for protection. The occupants proved to be Willie Ford and (Miss) Billy Garrin, who explained while testifying that in driving within Boyle Park they came to a dead-end road. In making a "U" turn a girl was heard calling for help. Ford was a paroled convict who worked for a bottling company. When the girl with Bailey begged to be taken to North Little Rock, Ford declined through fear that his parole would be revoked. The prosecuting witness got in Ford's car and talked with Ford's companion, revealing part of the sordid story. Ford, however, persisted in his refusal to give aid. The prosecuting witness, who in the meantime had been taken by Bailey to his own car, begged the couple to follow them to town, and this they promised to do. En route Bailey drove so rapidly that contact was lost. Ford's companion stopped and telephoned officers, and Ford later made a report.

The prosecuting witness, in explaining Ford's refusal to assist, testified that Bailey "dragged her" from the rear seat of Ford's car and forcibly returned her to his own conveyance. Ford told her he had taken Bailey's license number, that he would follow them, and if anything happened he would telephone the Sheriff:—"Then he drove awfully fast an awfully long way to

where he stopped again, and pulled off the highway onto a dirt road in the woods. Before he had completely stopped I jumped out of the car and ran a distance equal to half a block before he caught me and dragged me back." The transaction at that time was attempt to rape, but ". . . he kept cursing me in the filthiest language he could [think of]." Other attempts were made.

In these circumstances, characterized by intermittent attempts and specific acts of penetration, the night was spent. At various times Bailey appeared to be sleeping, but when the prosecuting witness attempted to escape he would grab her. Shortly after daylight Bailey drove the girl home. She immediately reported to her mother and sister.

Physical examination by a physician whose qualifications were not questioned revealed bruises and scratches on the body of the prosecuting witness, whose sex organs were bleeding. The hymen was lacerated, indicating virginity just prior to the transaction charged in the information. The Doctor testified that "from all the information I could obtain, the female organs had been entered."

The essential facts have been set out because of the contention that the jury should have been charged on attempted rape. The defendant did not testify.

First—Was the Jury Misled as to Clemency Rights? —After deliberating for approximately fifteen minutes, the jury re-entered the court room and the foreman said: "We would like to know if we can recommend clemency in this and leave it up to the Court?" Judge Fulk replied: "It is the law that the jury may recommend clemency, but it is not the law that the Court has to grant it." The Foreman then said: "We wondered whether we might recommend it." Judge Fulk answered: "You have the power to make that recommendation, . . . but it is not binding on the Court, and I don't know how the Court would take it." Then the Foreman remarked, "All right, we understand."

Counsel for appellant argues that the jurors were "unquestionably" led to believe that they might hope for clemency, even with a finding of guilt. But the jury could have exercised its own discretion to make the recommendation it thought proper. It is just as logical to believe that the Court's answer did not carry an inference of possible lenience, hence the fact-finders avoided the death risk and assessed life imprisonment. This is mere speculation, devoid of factual support, as is appellant's theory that the jury was misinformed. The Court correctly stated the law. A defendant cannot predicate error upon the want of it.

Second—Failure to Instruct on "Attempt" and Assault.—In defining rape the jury was told that "There must be a penetration of the body; there must be force; and it must have been against the will of the female." To this instruction the Court added: "The burden of proof is upon the State to show these things to your satisfaction beyond a reasonable doubt, otherwise you would have to discharge the defendant."

Appellant insists he was entitled to his Requested Instructions 13 and 14, shown in the margin.[1] Con-

[1] Requested Instruction No. 13: ". . . Under the information in this case you may find the defendant guilty of rape or you may find the defendant guilty of any of the offenses of assault which are included in the information. If you find the defendant guilty of assault with intent to commit rape, you may fix his punishment at any time not less than three nor more than twenty-one years. On the ather hand, if you have a reasonable doubt of whether it is rape or assault with intent to commit rape, you will find the defendant guilty of the lesser offense. If you do not find beyond a reasonable doubt that the defendant was guilty of either rape or assault with intent to commit a rape, [but] if you further find that the defendant committed an assault and battery on the prosecuting witness, it would be possible, under this information, if you found the evidence to justify it, to find the defendant guilty of assault and battery, which is the unlawful striking or beating of another person with the intent to inflict an injury, and fix his punishment at a fine not to exceed $200."

Requested Instruction No. 14 would have told the jury that if it found the defendant guilty of assault and battery under the evidence, "but are not convinced beyond a reasonable doubt that he is guilty of assault to rape, it will be your duty to return a verdict for the lesser offense. Further, if you find that the evidence under the instructions of the court justify you in returning a verdict of guilty of assault to rape, as defined in these instructions, and have a reasonable doubt as to his guilt as to the charge of rape, as contained in the information, it will be your duty to give him the benefit of that doubt and return a verdict only for the lesser offense."

versely, appellee relies in part upon *Whittaker* v. *State,* 171 Ark. 762, 286 S. W. 937, where it was held that the defendant could not complain of an instruction that he should be convicted of rape or acquitted; the defendant having requested an instruction to the same effect; nor, says the opinion, was it error to give the instruction complained of when testimony by the prosecutrix tended to prove that the accused was guilty of rape, and the defendant's testimony was to the effect that he was innocent of any crime.

In the case at bar there was testimony of conduct constituting rape, and *in addition* there were repeated attempts. An assault with intent to commit rape is included in the charge of rape. *Pratt* v. *State,* 51 Ark. 167, 10 S. W. 233. Chief Justice COCKRILL's language in the Pratt case was quoted in a more recent opinion rejecting the appellant's argument that he suffered prejudice because when tried for rape and convicted of an attempt, the jury was instructed on the lesser degree. It was the defendant's contention on appeal that he should have been convicted of rape, or acquitted.

Our statute defines rape as the carnal knowledge of a female, forcibly and against her will. Pope's Digest, § 3403, Ark. Stats. (1947), § 41-3401. Other statutes define accessory to rape, administration of potion to a female, carnal abuse, abduction, seduction, and specific sex crimes. All are collected in a chapter of the Digests.

It was said by Chief Justice WALKER in *Cameron* v. *State,* 13 Ark. 712, that upon an indictment for a felony the accused may be convicted of a misdemeanor "where both offenses belong to the same generic class, where the commission of the higher may involve the commission of the lower offense and the indictment for the higher offense contains all the substantive allegations necessary to let in proof of the misdemeanor," although at common law the rule was different.

Assuming, without deciding, that conviction for assault and battery can be upheld where the indictment or information charges rape, (the transactions not being generically related) still, the broad range of proof

brought into play and the possibility of capricious conduct by fact-finders in reducing a serious charge to something relatively unimportant—these considerations require that Courts carefully scrutinize instructions that might be seized upon by either side to emphasize inferences that at most are vague. Hence we have the rule that one who objects to an instruction not inherently wrong cannot complain of prejudice unless the particular vice is pointed to or a correct instruction is offered.

Here the defendant's Requested Instruction No. 13 would have authorized a conviction for assault and battery, ". . . which is the unlawful striking or beating of another person with the intent to inflict an injury, and fixing his punishment at not to exceed $200."

The statutory definition of assault and battery does not contain the word "intent." Pope's Digest, § 2978, Ark. Stats. (1947), § 41-603. It is the unlawful "striking or beating of the person of another" that the statute denounces, and the intent to inflict injury is judicial construction. But a proviso supplied by Act of Jan. 6, 1857, p. 48, says that the section shall not apply to assault and batteries of an aggravated character "in which the fine under existing laws could not be as low as ten dollars." Pope's Digest omits the reference to "fines as low as ten dollars," and reads, "Provided, this section shall not be construed to apply to assaults and batteries of an aggravated character." Other statutes, such as § 2960 of Pope's Digest, dealing with assault with a deadly weapon, use the expression, "with the intent to inflict upon the person of another a bodily injury." See *Watkins* v. *State,* 179 Ark. 776, 18 S. W. 2d 343.

Mr. Justice Wood, dealing with assault and battery in *Moreland* v. *State,* 125 Ark. 24, 188 S. W. 1, L. R. A., 1917A, 140, wrote the Court's opinion sustaining the conviction of the appellant, a family physician who kissed a married woman without her consent. He quoted with approval from Clark's Criminal Law, that "The least or slightest wrongful and unlawful touching of the person of another is an assault"; and, while an intent to do vio-

lence is an essential element, the degree is immaterial. The violence frowned on by the cases where assault is involved is, as Judge Wood pointed out, "the slightest unlawful touching of the person of another." The intent to inflict a traumatic injury is not an ingredient. The mere "laying on of hands" is sufficient.

Our view is that in the circumstances of this case, where all the testimony tended to show rape and attempted rape, and where the use of physical force was a means of accomplishing sexual desires, the Court was not required to instruct that the crime of assault and battery could not be established unless the "intent to inflict an injury" were shown; nor was the statement that a fine of but $200 could be assessed a correct declaration of the law without adding the proviso relating to assaults of an aggravated character. Requested Instruction No. 14 was so closely tied in with No. 13 that rejection of No. 13—which alone contained the definition—rendered No. 14 unacceptable.

Third—Preliminary Hearing.—The defendant's preliminary hearing, set for August 11, was continued until August 13, arrest having been made without a warrant. On August 12th counsel for Bailey filed with the Clerk of the Circuit Court his motion to quash the information, alleging a denial of due process through failure to provide a preliminary hearing. We have repeatedly held that a defendant is in lawful custody when an information has been properly filed with detention under it. The writ of *habeas corpus* is at all times available to one illegally held.

Fourth—Systematic Exclusion of Women From Jury Panels.—It was stipulated that in respect of the First Division of Pulaski Circuit Court, no woman had been selected by the Commissioners since 1925.

By Amendment No. 8 to the Constitution of Arkansas qualifications of electors were fixed and equal suffrage conferred, but "women shall not be compelled to serve on juries." See Act 402 of 1921; Pope's Digest, §§ 8302-3-4; Ark. Stats. (1947), § 39-112, 113, 114. The Constitutional proviso and statute sections have been

construed as a privilege women may claim—declarations of public policy pursuant to which it has not been thought that jury commissioners abused their discretion when there was failure to include women on the lists of those summoned.

Criminal court trials often involve testimony of the foulest kind, and they sometimes require consideration of indecent conduct, the use of filthy and loathsome words, references to intimate sex relationships, and other elements that would prove humiliating, embarrassing and degrading to a lady.

Under recognized requirements in this State, racial distinctions are disregarded in jury service. More often than not the fact-finders are not permitted to separate after a case has been submitted. Standards of deportment between men and women, and individual conceptions of personal propriety enter into the transactions; and while of course the State possesses power and could through an all-inclusive constitutional mandate say that in jury service there shall be no distinction between sexes, and while the *right* of Commissioners to call women unquestionably exists, it has not been thought that the policy constitutionally declared in 1920[2] was of a character depriving Commissioners of the discretion exercised in cases such as that with which we are dealing.

It is suggested that decisions of the Supreme Court of the United States are conclusive of the issue and bound the trial Court to quash the panel. *Ballard et al.* v. *United States,* 329 U. S. 187, 67 S. Ct. 261, 91 L. Ed. 181. Effect of that case is to say that due process failed when the defendant (a female) was tried by a California jury of men, a showing having been made that women had been systematically excluded from jury service. The decision did not rest upon mere difference of sex. The Ballard case, however, was in Federal Court, and it is noteworthy that California's constitution does not carry a savings clause in favor of women.

[2] Amendment No. 8, although adopted in 1920, was not so recognized until the decision in *Brickhouse* v. *Hill* was handed down, 167 Ark. 513, 268 S. W. 865, followed by the ruling in *Combs* v. *Gray,* 170 Ark. 956, 281 S. W. 918, decided April 12, 1926.

In exercising its supervisory power over the administration of justice in the Federal Courts, the U. S. Supreme Court has said that ". . . the purposeful and systematic exclusion of women" by those charged with the duty of calling jurors for the Federal District Courts in states where jury duty is imposed alike upon the two sexes, relieves the defendant of the burden of proving prejudice in a particular case; but this rule has not been extended to state court trials—and certainly there are no expressions indicating that the discretion permitted commissioners under a State constitution such as ours would be controlled without a showing of conduct resulting in prejudice. See *State* v. *Taylor,* 356 Mo. 1216, 205 S. W. 2d 734.

In *Fay* v. *New York,* 332 U. S. 261, 91 L. Ed. 2043, 67 S. Ct. 1613, a state prosecution was brought to the U. S. Supreme Court by *certiorari.* The opinion was written by Mr. Justice JACKSON, who said that proof that only those women who volunteered or were suggested as willing to serve were subpoenaed for examination for service "was insufficient to show that women were intentionally and deliberately excluded, bearing in mind that New York gives women the privilege to serve, but does not impose a duty". A significant statement by Mr. Justice JACKSON is:

"While this case does not involve any question as to the exclusion of Negroes or any other race, the defendants rely largely upon a series of decisions in which this Court has set aside State Court convictions of Negroes because Negroes were purposefully and completely excluded from the jury. However, because of the long history of unhappy relations between the two races, Congress has put these cases in a class by themselves. The Fourteenth Amendment, in addition to due process and equal protection clauses, declares that 'The Congress shall have power to enforce, by appropriate legislation, the provisions of this article'. So empowered, the Congress on March 1, 1875, enacted that 'no citizen possessing all other qualifications which are or may be prescribed by law shall be disqualified for service as grand or petit juror in any court of the United States,

or of any State on account of race, color, or previous condition of servitude'; and made it a crime for any officer to exclude any citizen on those grounds. 18 Stat. 336-37, 8 U. S. C. Sec. 44. For us the majestic generalities of the Fourteenth Amendment are reduced to a concrete statutory command when cases involve race or color which is wanting in every other case of alleged discrimination. . . . It is significant that this Court never has interfered with the composition of State Court juries except in cases where the guidance of Congress was applicable, . . . [hence] one who would have the judiciary intervene on ground not covered by statute must comply with the exacting requirements of proving clearly that in his own case the procedure has gone so far afield that its results are a denial of equal protection or due process''.

We think the inference deducible from the Fay case is that where a State does not impose upon women as a class the inescapable duty of jury service, a defendant who complains that due process was denied, or that he was not afforded the equal protection contemplated by the Fourteenth Amendment, must show something more than continuing failure of jury commissioners to call women for services in a division of the Court where the innate refinement peculiar to women would be assailed with verbal expressions, gestures, conversations and demonstrations from which most would recoil.

Attention is called to the fact that the stipulation upon which appellant relies does not say that women have been systematically excluded from jury service. The court, seeking to express what it thought was intended, remarked that ''The stipulation relates to defendant's motion to quash the panel because the jury commissioners have habitually excluded women from jury service solely because they are women''.

The motion did not allege they had been *''systematically''* excluded. Our decision, however, does not rest upon this technical refinement; but rather upon the substantial ground that the record does not show that

the defendant failed to receive a fair trial at the hands of a competent jury.

Affirmed.

RAGLAND *v.* RHOADS.

4-8783 219 S. W. 2d 639

Opinion delivered April 11, 1949.

Rehearing denied May 9, 1949.

A. G. Meehan and *G. B. Segraves, Jr.,* for appellant.

Virgil R. Moncrief and *John W. Moncrief,* for appellee.

HOLT, J. January 22, 1946, appellant, H. S. Ragland, sued appellee, R. S. Rhoads, and Ray Allen Rhoads, in the Northern District of Arkansas county, to recover $1,263.65 for work and labor performed under an alleged oral contract for drilling a well, and pulling, and installing a pump from an old well.

February 1, 1946, separate summonses were issued for appellee and Ray Allen Rhoads. The sheriff's re-

turns show service on R. S. Rhoads February 1, 1946, and on Ray Allen Rhoads, a non-resident, by delivering a copy to R. S. Rhoads, father of Ray Allen. The returns did not show the district or county in which the alleged service was had.

Thereafter, February 26, 1946, appellee not having answered, or appeared, judgment by default was taken against R. S. Rhoads for the amount claimed. The complaint against Ray Allen Rhoads was dismissed.

December 19, 1947, R. S. Rhoads appeared specially, and without waiver of any rights or entry of appearance, filed motion to set aside the default judgment on the grounds that he had never been served with process, knew nothing of the filing of the suit against him, or its pendency, until in December, 1947, and that he had a good and valid defense, alleging that appellant contracted with him to construct, for appellee, a rice irrigation well, to produce, and warranted to produce, 600 to 700 gallons of water per minute; that appellant drilled well on land of appellee but it did not, and never would, produce 600 gallons of water per minute; that it never produced more than 300 gallons per minute, at irregular intervals, which was not practical; and that appellee was forced to abandon the well and make other provisions for irrigating his rice after appellant refused to comply with his contract. Appellee further alleged that he was, at the time the suit was filed, and is now, a resident of the Southern District of Arkansas county.

Appellee's motion was presented to the trial court April 30, 1948, and after the hearing on the issues presented, the court found, in effect: 1. That R. S. Rhoads had alleged and proved a *prima facie* defense. 2. That R. S. Rhoads had not been served with summons. 3. That R. S. Rhoads had no knowledge of the filing of the suit, prior to issuance of execution under default judgment sought to be set aside. 4. That R. S. Rhoads was a resident and citizen of the Southern District of Arkansas County on pertinent dates, and not a resident of Northern District at such times.

Accordingly, a decree was entered setting aside the judgment, quashing the service, dismissing appellant's

suit "for want of jursidiction without prejudice," and that the appellant take nothing thereby.

This appeal followed.

Appellee successfully sought to vacate and set aside the default judgment against him under the provisions of Ark. Stats., (1947), § 29-506, sub-division 7; *Hunton* v. *Euper,* 63 Ark. 323, 38 S. W. 517.

He was required to prove not only that he had not been served with summons, but also to produce sufficient evidence to make a *prima facie* showing of the truth, or existence, of a valid defense, and further that he did not have knowledge of the existence of the suit against him in time to make a defense.

We have many times announced the rules governing in cases such as the one now presented. We said in *C. A. Blanton Co.* v. *First National Bank of Marked Tree,* 175 Ark. 1107, 1 S. W. 2d 558: "This court is committed to the rule that 'one who is aggrieved by a judgment rendered in his absence must show not only that he was not summoned, but also that he did not know of the proceedings in time to make a defense, in order to obtain relief.' *Fore* v. *Chenault,* 168 Ark. 747, 271 S. W. 704; *State* v. *Hill,* 50 Ark. 458, 8 S. W. 401; *Moore* v. *Price,* 101 Ark. 142, 141 S. W. 501; *Quigley* v. *Hammond,* 104 Ark. 449, 148 S. W. 275; *First National Bank* v. *Dalsheimer,* 157 Ark. 464, 248 S. W. 575.

"A party against whom a judgment is rendered must show a meritorious defense in order to get the judgment set aside. *King* v. *Dickinson-Reed-Randerson Co.,* 168 Ark. 112, 269 S. W. 365; *Moreland* v. *Youngblood,* 157 Ark. 86, 247 S. W. 385; *Minick* v. *Ramey,* 168 Ark. 180, 269 S. W. 565," and in *Knights of Maccabees of the World* v. *Gordon,* 83 Ark. 17, 102 S. W. 711, we said:

"It would necessarily follow that, if the judgment could not be set aside upon motion or complaint, evidence must be heard by the court before it could adjudge that there is a valid defense. But, as the truth of the defenses are not finally tried in the proceedings to vacate

the judgment, enough evidence to make a *prima facie* showing of the truth or existence of the defenses would be sufficient to authorize the court to vacate the judgment." See, also, *O'Neal* v. *B. F. Goodrich Rubber Company,* 204 Ark. 371, 161 S. W. 2d 52.

Appellee testified positively that he had never been served with summons and knew nothing about the suit until some time in December, 1947. There was other evidence tending to corroborate appellee, and we think, when all the facts are considered, they were sufficient to support the court's finding that appellee had not been served and knew nothing about the suit in time to make his defense.

The evidence in support of appellee's alleged meritorious defense, which we do not detail, was, we think, sufficiently substantial to support the court's finding that a *prima facie* showing was made by appellee on this issue.

On the whole case, we conclude that the judgment should be and is affirmed.

HOLDER *v.* FRASER, JUDGE.

4558 219 S. W. 2d 625

Opinion delivered April 11, 1949.

Shouse & Shouse and *Willis & Walker,* for petitioner.

Eugene W. Moore, N. J. Henley, Ike Murry, Attorney General and *Jeff Duty,* Assistant Attorney General, for respondent.

GEORGE ROSE SMITH, J. This petition for a writ of prohibition presents a question of first impression in Arkansas. Petitioner was charged by separate informations with the involuntary manslaughter of three persons, caused by his driving a car in reckless, willful and wanton disregard of the safety of others. Ark. Stats. (1947), § 41-2209. After trial and conviction upon the first information petitioner interposed a plea of former jeopardy to the other charges. The court below rejected the plea; we are now asked to forbid a second trial.

As in most states, our constitution provides that no person shall be twice put in jeopardy of life or liberty for the same offense. Ark. Const., Art 2, § 8. The situation in which a single act has caused several injuries or deaths has created two lines of authority in the American decisions. Doubtless this disagreement is occasioned by the fact that this situation lies at the intersection of conflicting principles of public policy. On the one hand, the apparent injustice of trying a man repeatedly for the consequences of a single action has led many courts to hold that there is only one offense. On the other, the natural inclination to attach greater gravity to the killing of several persons than to the killing of one has been emphasized by other courts in finding multiple offenses in the same act.

We touched upon but did not decide the question in *Jones* v. *State,* 61 Ark. 88, 32 S. W. 81, on which both petitioner and respondent rely. There we pointed out that some authorities hold that but one offense results from a single act and volition. We distinguished those cases, however, on the ground that the deaths in the *Jones* case were not in consequence of one act, although closely connected in point of time.

We also said that Jones could not have been convicted of the murder of A under an indictment for the murder of B, or *vice versa.* The respondent insists that this language is decisive here, but this approach does not reach the heart of the problem. If a thief simultaneously steals two objects, the State may charge him with the theft of one, and under that indictment he cannot be convicted of stealing the other. A plea of double jeopardy would nevertheless bar a second trial for larceny; for there is only one offense, which the State cannot subdivide by making separate accusations. Thus if the deaths in the *Jones* case had really been one offense, the State could not have split the public cause of action into piecemeal charges. We must evidently go beyond the language of that opinion to answer the question now presented.

When the crimes involve the element of intent we see no difficulty in finding two offenses in one act. If the accused kills two people by immediately successive pistol shots, it is unlikely that any court would forbid a second trial. As far as the policy against double jeopardy is concerned, we do not see that it makes any difference if the accused accomplishes the same purpose at one stroke, as by the use of poison or a shotgun. If he has a distinct and severable intention to bring about the death of each victim, then each intention is a necessary element of a separate offense against the State. This point of view is well expressed in *People* v. *Warren,* 1 Parker's Cr. Rep. (N. Y.) 338.

To what extent is this reasoning applicable to the present case? What the statute punishes is driving with reckless, willful and wanton disregard for the safety of others. The offense does not involve intent in the sense of a deliberate desire to bring about a certain result. Petitioner accordingly urges us to follow such cases as *State* v. *Wheelock,* 216 Iowa 1428, 250 N. W. 617, holding that a single act of negligence does not constitute three offenses even though it causes three deaths.

We need not express an opinion as to the merits of the rule just stated, for here we are confronted with conduct that was reckless rather than merely negligent.

Recklessness is more closely akin to intent than is sometimes realized. It has been described as conduct involving a risk to others that is out of all proportion to its own utility. As the disproportion between utility and risk increases, a point is reached at which the degree of culpability becomes indistinguishable from that inherent in activity by which harm to others is consciously intended. See Rest., Torts, § 282, Comment *d*. We have said that willful negligence involves consciousness of one's conduct and contains an element equivalent to constructive intent. *Froman* v. *J. R. Kelley Stave & Heading Co.*, 196 Ark. 808, 120 S. W. 2d 164.

Whether particular conduct is cautious or reckless depends upon its attendant circumstances. To drive a car at sixty miles an hour may demonstrate extreme caution upon a race-track and yet may be almost as culpable as murder if done in a crowded city street. Here petitioner is charged with driving recklessly, willfully and wantonly in such circumstances that three people were killed. It is stated that he was under the influence of intoxicants at the time. On the basis of these allegations we must treat petitioner's conduct as being equivalent to a conscious and deliberate disregard for the safety of others. Such behavior borders so closely upon that motivated by actual intent that we have no hesitancy in saying that the same reasoning is applicable. Petitioner risked a violation of the statute as to each person whose life he imperiled and may be held separately responsible for each death proximately resulting from the prohibited conduct.

Writ denied.

GRIFFIN SMITH, C. J., ROBINS and MCFADDIN, JJ., concur.

ED. F. MCFADDIN, Justice, concurring. I agree with the result reached in this case—*i. e.*, that the writ of prohibition should be denied—but I arrive at such result by a method of reasoning entirely different from that which is stated in the opinion of Mr. Justice GEORGE ROSE SMITH. Since the matter of multiple homicides may

arise in some future case, I desire to state my reasons for voting to deny the writ of prohibition:

1. Our Statute (§ 2980, Pope's Digest, § 41-2207 Ark. Stats. of 1947) defines manslaughter as:

"The unlawful killing of a human being . . ." I emphasize that the crime relates to "*a* human being" and not to "human beings." A separate crime is committed every time *any* human being is unlawfully killed. If six persons are unlawfully killed at the same time, then six crimes are committed. Our statute does not give a criminal a "bargain rate" on wholesale homicides.

2. Anything that might have been said in our earlier cases, contrary to the paragraph immediately *supra,* has been changed by the provisions of Initiated Act 3 of 1936 (found on page 1384, *et seq.*, of the volume containing the Acts of 1937). Section 20 of the said Act 3 amended § 3016, Crawford & Moses' Digest, (relating to the joinder of offenses) so that the section with subdivision 12 added now reads:

"The offenses named in each of the subdivisions of this section may be charged in one indictment:

. . . . .

"Twelfth. The homicide of several persons, when committed by the same person or persons, at the same time or in furtherance of the same criminal design."

This twelfth subdivision was entirely new to § 3016, Crawford & Moses' Digest, and expressly allows the *several* offenses to be charged against an accused in one indictment charging the "homicide of several persons when committed. . . . at the same time." This quoted language from the initiated act certainly means that the unlawful killing of several persons, although done at the same time, constitutes separate offenses. Since separate offences were committed, then the conviction for one such killing would not allow the plea of former jeopardy to be sustained when the accused was brought to trial for another such killing, although done at the same time.

Without laboring the point, I reiterate that in my opinion a separate offense is committed by each unlawful killing, and therefore the writ of prohibition was properly denied in this case. I am authorized to state that the Chief Justice and Mr. Justice ROBINS agree with the views herein expressed.

LONGSTRETH *v.* COOK, SECRETARY ARKANSAS RACING COMMISSION.

4-8780 220 S. W. 2d 433

Opinion delivered April 4, 1949.

Dave E. Witt, for appellant.

Ike Murry, Attorney General and *O. T. Ward,* for appellee.

Otis Nixon, Warren E. Wood and *Griffin Smith, Jr.,* for intervener.

FRANK G. SMITH, J. The question presented by this appeal is whether Act 46 of the Acts of 1935, p. 90, legalizing pari-mutuel betting on horse races violates § 14 of Art. 19 of the State Constitution and is void for that reason. This section of the Constitution reads as follows: "No lottery shall be authorized by this State, nor shall the sale of lottery tickets be allowed." This Act 46 of 1935 created the Arkansas Racing Commission, and, among other things, provided that the Commission shall promulgate rules and regulations for horse racing and for the issuance of permits to operate race tracks and licenses to hold racing meetings under the terms and conditions therein specified.

Section 14 of this Act reads in part as follows: "Any license under the provisions of this Act, conducting a horse racing meeting, may provide a place or places in the race meeting grounds or enclosure at which he, they or it may conduct and supervise the pari-mutuel or certificate system of wagering by patrons on the horse races conducted by such license at such meeting, and such pari-

mutuel or certificate method of wagering upon such horse races held at said race track, and within such race track, and at such horse racing meeting, shall not under any circumstances if conducted under the provisions of this Act, be held or construed to be unlawful, other statutes or parts of statutes of the State of Arkansas, to the contrary notwithstanding."

The Act is a lengthy and very comprehensive one, and contains specific directions for the exercise of the license which the Commission is authorized to issue. Since the passage of the Act in 1935, the Racing Commission has issued annually a permit or license to hold racing meetings under its provisions in the City of Hot Springs, and it is sought by this suit to restrain the Commission from renewing this license or permit.

The argument is made that the Act is violative of the State's public policy, and that it legalizes what would otherwise be an unlawful act. In this connection it may be said that an Act was initiated and submitted at the General Election held in 1944 to repeal this Act, which was defeated by a large majority. As to what shall be the State's public policy, it may be said that this is a question which the General Assembly may decide. Upon the authority of *Lewis' Sutherland Sta. Const.,* Vol. I, 136, we said: "As to whether a law is good or bad law, wise or unwise, is a question for the Legislature, and not for the Courts." *State* v. *Hurlock,* 185 Ark. 807, 49 S. W. 2d 611.

We may therefore consider only the question of the constitutionality of Act 46, and rules have been often announced by this and other Courts to guide the approach to that question. In the recent case of *Fugett* v. *State,* 208 Ark. 979, 188 S. W. 2d 641, we said: "The wisdom and propriety of statutory enactments are matters to be determined solely by the legislative branch of the government. Courts are not authorized to strike down a law enacted by the General Assembly unless it clearly appears that the law contravenes some provision of the constitution; and, in case of doubt as to the con-

stitutionality of a statute, the doubt must be resolved in favor of the validity of the law."

Many of our cases are cited in support of the statement just quoted, to which an indefinite number from other jurisdictions could be added.

Unquestionably Act 46 has authorized and legalized and possibly given encouragement to a form of gambling, but the question here presented is whether it has done so by authorizing a lottery. If it does, the Act is unconstitutional, as the provisions of the Constitution hereinabove quoted denied the General Assembly the power to authorize a lottery. So the question for decision is whether Act 46 authorizes a lottery.

The State Commissioner of Revenues is made the Secretary of the Racing Commission, and in the discharge of the duties imposed upon him he visited the track where the races are held and explained in detail how the betting thereon is conducted, and there appears to be no question but that the betting is conducted in a manner authorized by the Act.

The Court below held that a lottery had not been authorized and was not being conducted and dismissed the suit, from which decree is this appeal. This finding was based upon the testimony of the Revenue Commissioner, which is undisputed and is to the following effect:

The permit was issued to the Oaklawn Jockey Club of Hot Springs. The American Totalizator Company, which is a separate corporation from the Oaklawn Jockey Club, has a contract with the club to set up the mechanical equipment for the purpose of issuing and selling tickets to persons wishing to bet through designated windows in what is called the pari-mutuel room. There are ticket sellers at each window who are employees of the Totalizator Company. Under the law, ten per cent. of the proceeds of the sale of these tickets goes to the Jockey Club and five per cent. to the State, and the Totalizator Company is paid out of the Jockey Club's part of these proceeds. The Totalizator Company owns the machines which are used in betting and they are not for sale. At

one window tickets are sold on horses to win, that is, to cross the finish barrier first. At another bets are made on a horse for a place, that is, to run second; and at another window, bets are made that a horse will show, that is, run third. At still another window bets are made which are said to be "across the board" or combinations, that is, that the horse bet on will finish first, second or third.

Bets are received at still another window called a Daily Double; that is, the bettor names the horse which will win the first race and another horse which will win the second race, and if the horses thus bet on win both the first and second races the person thus betting is said to have won the Daily Double. This pool is independent of all the other pools and relates only to the first and second races.

When a person wishes to purchase his ticket at a designated window the seller pushes a button similar to a cash register and the ticket at that time is printed by an individual machine designating the number of dollars paid for the ticket, and it is registered on an individual calculator which is there and is automatically transferred to what is called a master control totalizator. All of this takes place during the time the tickets are being sold for a particular race and they are sold before the beginning of that race. No tickets are sold in the second race until the first race has been run, with the exception of the Daily Double, nor on the third race until the second race has been run, and so on with the remaining races. Altogether eight races are run each day.

When a race is about to be run the machines are locked with a master key by the racing stewards who have a box in the stewards' stand and the betting windows are not reopened until a calculation is made of all the money that has gone through the individual machines and the totalizator has figured the amount of money in the Win, Show, and Place pools. From the total that has been placed in all the pools, fifteen per cent. is deducted, of which the Jockey Club gets ten per cent. and the State, five per cent.

The Jockey Club procures the horses that are to run at the racing meet, and there were about 1,200 of these during the preceding meeting. Some of these are not entered or run at any race during the meeting, but are kept there for training purposes. Others will run in more than one race during the meeting.

The owners bring their horses to the meeting and are accompanied by their trainers, who keep the horses in condition and accustom them to the tracks on which the races will be run. The horses are ridden by riders called jockeys, whose training, skill and ability are known to the owners who compete for the prizes offered in each race, and it is these prizes paid in money which compensate the owners for racing their horses. They receive no part of the money bet on the races. Admission fees to the race track are charged, but the owners of the horses have no share therein.

After the deduction of the fifteen per cent. above mentioned has been made the balance in each pool is paid to the holders of tickets bet on the horses in the respective pools. The bettors do not bet against each other. The Act makes it unlawful to do so. The bet is between the bettor and the Jockey Club or the Association.

Horses are selected for entrance in a particular race by the Association, and the horses' names are listed or lined up on a daily racing card, and there is sold a racing form which shows the weight carried by each horse and its handicap depending on the past performances of the horse in previous races at that or other tracks. This weight handicap is intended in some measure to equalize the speed of the horses, and the amount thereof depends upon the horse's record in prior races run within the preceding twelve months.

The owners have trainers who are skilled in handling horses with the purpose of increasing their speed and making them more responsive to the control of the jockeys.

Many persons attend the races for the thrill of witnessing the horses as they cross the finish line, and add

to the thrill and interest by betting on some horse without knowledge of the information disclosed by the form sheets. For instance, a lady might bet the minimum amount permissible on a horse having the same name as her kitchen range. But sources of information now are provided, as stated above, by which bettors may bet with more discrimination and with improved chances of selecting or picking a winner.

These form sheets designate whether upon previous performances a particular horse is a fair mud runner, a good mud runner, or a superior mud runner, which information is of value when the track upon which the races are to be run on the day of the issue of the form sheet is muddy.

Followers of racing who for long periods of time have studied the records of the horses choose as their selections the horse which in their opinion will be most likely to win and these are for sale and may be purchased at the track. Neither the Jockey Club nor anyone connected with it fixes the odds which will prevail on any horse. The bettors themselves do this and it is done through the number of bets made and the amount thereof on particular horses.

The animal equation enters into these races just as the human equation enters into sports between men and women. A horse may run better on one day than on another, depending on the condition of the horse, and it is the function of the trainer to see that the horses are in the best possible condition and properly trained. The element of chance necessarily enters into these races, but it is by no means controlling. Other elements of more importance are the condition and the power of endurance of the horse and the skill and daring of its rider. Some jockeys win more races and a higher percentage of the races in which they participate than others. The services of these jockeys are of course in greater demand by the horse owners who must win the races to obtain the money prizes for which they race.

Under the facts above stated, is the horse race a lottery conducted under the pari-mutuel system herein de-

scribed? It must be admitted that courts have differed in their conclusion, but an examination of many of these cases leads to the conclusion that the great weight of authority is that such races are not lotteries and we think the sounder reasoning supports that conclusion.

Lotteries are of ancient origin, some conducted for benevolent purposes and others solely for gambling. They became so common and their influence so pernicious that efforts were made to prohibit them. In every Constitution we have had the General Assembly has been denied the power to authorize their operation. They were singled out and not treated as other forms of gambling. Except as to lotteries, the Constitution left to the General Assembly the question of permitting, prohibiting or regulating gambling, and this long before the pari-mutuel system of conducting horse races had been thought of.

So the question remains for decision whether the betting which has been licensed under the provisions of Act 46 of 1935 is a lottery. The inhibitions of our Constitution against authorizing a lottery would not make that a lottery which was not so in fact.

The word lottery is derived from the word lot, one definition of which as given in Webster's New International Dictionary is: "An object used as one of the counters or checks in determining a question by the chancefall or choice of one or more of them; a sort. See Sortilege, Divination. In *drawing lots* each competitor may place his lot (marked) in a receptacle from which a disinterested person draws one, on the owner of which the chance falls; or, each competitor may draw one of a series of lots, the chance falling upon the person who draws one previously specified. In *casting lots,* the lots are placed by the competitors in a receptacle which is then shaken until one falls out, the chance falling on its owner."

The word lottery is defined by the same authority as follows: "A scheme for the distribution of prizes by lot or chance; esp., a scheme by which one or more prizes are distributed by chance among persons who have paid

or promised a consideration for a chance to win them, usually as determined by the numbers on tickets as drawn from a lottery wheel."

In our case of *Burks* v. *Harris,* 91 Ark. 205, 120 S. W. 979, 23 L. R. A., N. S. 626, 134 Am. St. Rep. 67, 18 Ann. Cas. 566, the following definition was given: "A lottery is a species of gaming, which may be defined as a scheme for the distribution of prizes by chance among persons who have paid, or agreed to pay, a valuable consideration for the chance to obtain a prize." This definition was taken from 25 Cyc. 1635.

It appears therefore that to constitute a lottery it is essential not only that the element of chance is present, but also that it controls and determines the award of the prize whatever it may be.

In the chapter on *Gaming,* 12 R. C. L. 716, § 14, it is said: "A game of chance is said to be such a game as is determined entirely or in part by lot or mere luck, and in which judgment, practice, skill and adroitness have honestly no office at all, or are thwarted by chance." It was there further said: "The test of the character of the game is not whether it contained an element of chance or an element of skill, but which of these is the dominating element that determines the result of the game." In a note to the text just quoted the case of *People* v. *Lavin,* 179 N. Y. 164, 71 N. E. 753, is cited as having been annotated in 1 Ann. Cas. 165, 66 L. R. A. 601. See, also, 27 C. J. 968, Chapter *Gaming,* §§ 4, 5, 6 and 7, and 34 Am. Jur. Title *Lotteries,* § 6, p. 649.

The question whether betting on horse races in which the pari-mutuel system is employed is the subject of the annotation in 52 L. R. A. 51 and 85 A. L. R. 605. The briefs of opposing counsel in the case last cited collect other annotated cases from which it appears to have been more frequently held that the pari-mutuel system of wagering does not constitute a lottery. An opinion would be of interminable length which undertook to review all of them.

The annotated case in 85 A. L. R., *supra,* is that of *People* v. *Monroe,* 349 Ill. 270, 182 N. E. 439. In that

case, with one member of the Court dissenting upon a ground not stated, the Supreme Court of Illinois held that a statute not essentially different from our Act 46 had not authorized a lottery. In reaching the conclusion stated it was there said: "Every event in life and the fulfillment of every lawful contract entered into between parties is contingent to at least some slight extent upon chance. No one would contend, however, that a contract knowingly and understandingly entered into between two parties is a gaming contract merely because its fulfillment was prevented as the result of the befalling of unknown or unconsidered forces, or by the issue of uncertain conditions, or by the result of fortuity. The pari-mutuel system of betting does not come within the definitions given above. (In Webster's Dictionary, which we have hereinabove quoted.) While the amount of money to be divided is indefinite as to dollars and cents, it is definite in that the amount of money to be divided is the total stakes on the winning horse, less a given percentage to the management. The persons among whom the money is to be divided are not uncertain, as they are 'those who bet on the winning horse.' The winning horse is not determined by chance, alone, but the condition, speed, and endurance of the horse, aided by the skill and management of the rider or driver, enter into the result." As showing that a horse race is not a game of chance the Court pointed out that in such races the horses engaged in the race are subject to human guidance and management, and it may be added that whip and spur are used to incite the horses to put forth their best efforts to win.

The cases cited and relied upon as supporting the contention that a lottery has been authorized are *State* v. *Ak-Sar-Ben,* 118 Neb. 851, 226 N. W. 705, and *Pompano Horse Club* v. *Florida,* 93 Fla. 415, 111 So. 801, 52 A. L. R. 51.

The Nebraska opinion above cited, delivered in 1929, supports appellant's contention, but it may be said of it that this opinion led to the adoption of an amendment to the Constitution of that State, § 24, Art. III, which nullified the opinion. The Pompano case, *supra,*

did not involve the question of whether a horse race was dependent on chance or not, the issue there being whether betting on a horse race was prohibited by the Florida game statute. The Court held that it was and so we would hold if the question was merely whether it was gambling. The Florida Court said: "The question before us is whether or not the betting, selling and redeeming of certificates in the manner and for the purpose stated constitutes gambling or a game of chance." The Court merely held that it was gambling, and so it is. So, also, is betting by the pari-mutuel system gambling, but it is not a lottery, and Act 46 provides that such betting shall not be unlawful.

The use of the pari-mutuel machine does not make the betting a lottery, if it is not otherwise so, as it makes no determination of what horses are winners. It is merely a wonderful machine which expedites calculations which could laboriously be made without its use. Its use in no manner affects the results of a race as it merely calculates the results of the betting after the races have been run and the respective winners announced.

We conclude, therefore, that while the element of chance no doubt enters into these races, it does not control them, and that there is therefore no lottery.

The decree so holding is affirmed.

This suit was originally filed by James MacKrell who did not prosecute an appeal from the decree, but one O. D. Longstreth, Jr., to save the appeal, filed an intervention in the court below alleging the same right to prosecute the suit which MacKrell had and prayed in the Court below an appeal and caused a transcript of the proceedings to be prepared, which he filed in this Court and his appeal was granted by the Clerk of this Court.

Griffin Smith, C. J. and Robins, J., dissent.

George Rose Smith, J., not participating.

Robins, J., dissenting. I respectfully dissent. I think we have no jurisdiction of this appeal for two reasons: In the first place, the lower court had no jurisdiction, and we can therefore acquire none on appeal. And,

in the second place, the appellant was not a party to the suit below; hence he had no right to appeal from the lower court's decree.

Inasmuch as I believe that we should dismiss the appeal for want of jurisdiction, it is unnecessary for me to express an opinion on whether the legislature has the constitutional power to enact a law which, in effect, makes every citizen of Arkansas a partner in a great gambling enterprise.

GRIFFIN SMITH, Chief Justice, dissenting. The basic grounds for this dissent—sustained, as I think, by mathematics, language of our Constitution, known practices, and admitted physical transactions—are fourfold: (1) The majority's mistake in concluding that the gambling contracts authorized by the Racing Act of 1935 are inter-party wagers, or mutual bets. (2) The term "pari-mutuel", as employed by the General Assembly, is a misnomer utilized to conceal an unlawful purpose. (3) The broader phrase *"pari-mutuel or certificate system of wagering by the patrons"* is employed to convey the erroneous belief that the transaction is carried out by mutual wagers or reciprocal bets between Jockey Club upon the one hand and ticket-purchasers on the other, although context of the Act conclusively shows that the system depends entirely upon lottery contracts—undertakings in which the management does not assume a semblance of risk, but on the contrary acts as money-holder in playing one patron against another—gathering an assured profit like the lotteries of 1874. (4) The system contains the vice that distinguished lotteries of 1874 from other forms of gambling: namely, the general sale of chances called tickets. This was a feature which gave the lottery operator the "extensive reach" that enabled promoters to draw all classes within the orbit of chance—rich, poor, skilled, unskilled, and all too often the trustees of funds belonging to another.

First—Method of Operation.—The only question is whether the character of gambling legalized by Act 46 constitutes a lottery, as claimed by Longstreth, or

whether the practices authorized are, in fact, mutual bettings, for "No lotteries shall be authorized by this State, nor shall the sale of lottery tickets be allowed". Constitution of 1874, Art. 19, § 14.

The enactment of 1935 authorizing horse race gambling avoids use of the term *lottery,* or *lottery tickets.* Instead of these words there is recognition of the "pari-mutuel or certificate system". Hence, it is essential that we determine what this system is; how—if at all—it differs from the mischief expressly condemned, and whether legislative alchemy in the form of rhetoric can legalize a practice singled out from all the rest and banned as a burden to the social structure.

Section Fourteen of the Act provides that "No other place or method of betting, pool-making, wagering, or gambling [other than the pari-mutuel or certificate system] shall be used or permitted by the licensee, nor shall [the authorized system] of wagering be conducted on any races except horse races at the race track where [the system] of wagering is licensed". On all moneys wagered the Racing Commission may authorize any licensee to retain "not to exceed ten percent and breaks" on the total of amounts wagered. Section Nineteen restricts gambling to such mechanical equipment as the Commission may adopt.

Uncontradicted testimony of one of appellant's witnesses is that the Oaklawn Jockey Club as licensee utilizes machines owned by American Totalizator Company. The Company is agent of the Jockey Club in the matter of installing and operating the equipment, and in selling tickets to patrons. All money received for tickets is put in pools designated "Win", "Place", and "Show", corresponding with tickets. Money bet on a first choice horse goes into the Win pool, that wagered on second choice goes into the Place pool, and a third choice goes to Show. From the total of each of these pools ten percent is deducted for the Jockey Club (hereafter spoken of as the Association) and five percent is taken for the State. This leaves eighty-five percent for return to the bettors.

The evidence shows these additional facts: Weights are sometimes placed upon horses as handicaps, or, as it is said, "to equalize their speed" in relation to other entries. This, of course, affects the chance to win. Through purchase of a certificate, a bettor selects the horse upon which he desires to wager money. Odds on the various horses are determined by the number of persons betting on each animal. There is no privity of contract between or among the bettors. On the contrary, all contracts affecting results are between the American Totalization Corporation as seller of the tickets and the person who buys them. The Association does not bet in any manner against patrons. In other words, all funds entering the several pools are supplied by patrons.

To gain a better perspective from which to analyze all circumstances with which the transactions are invested, it is well to go back to the situation in 1874. By putting one's self in the position occupied by men who framed the Constitution, we can more accurately gauge the purpose.

Suppose A offers to bet B two dollars against an equal sum that a designated horse will win a stipulated race. B accepts and places his money with C as stakeholder. A may either win or lose, and B is in the same position. Since each of the contracting parties has a chance to win, and takes the risk of loss, the engagement is termed a mutual bet or wager. See *Carlill* v. *Carboloc Smoke Ball Co.,* (1892) 2 Q. B. 484, 490. On App., (1893) 1 Q. B. 256; Street's Law of Gaming, pp. 53, 73, 212, note (o) (London, 1937); 38 C. J. S., p. 43; Halsbury's Laws of England, 15: 473, 2d ed.; *Stearnes* v. *State* (1858) 21 Tex. 692, 694; Am. & Eng. Enc. of Law, 2d ed., 14:669, 29:1082; *Ellesmere* v. *Wallace,* (1929) 2 Ch. 1, 49, 52, 54; *Harris et al.* v. *White,* (1880) 81 N. Y. 532, 539; *Thompson* v. *Williamson,* 67 N. J. Eq. 212, 218, 58 Atl. 602; 27 C. J. 974.

All gambling is carried on by means of contracts resulting from offer and acceptance, either express or implied. 38 C. J. S. 44. There must be at least two parties to each contract. The illustration of A's offer to

B, and B's acceptance, is that of a mutual bet or wager. The alternative depriving the transaction of mutuality enters the picture when one of the parties has what is sometimes spoken of as "a sure thing". Since he cannot lose, nothing has been risked. But the naked statement of this relationship destroys the quality of mutuality and negatives any thought of "bet", or "wager". Viewed from this standpoint, the adventure has degenerated into a device intended to draw careless or credulous persons into a scheme involving acceptance of a tainted offer.

For instance: A sets up a stratagem and contracts with B, but at the same time he makes a similar contract with C, then plays them against each other. A, holding the two contracts, has certainty for a background; while B or C will be less fortunate. Unlike A, each cannot win. Neither of the contracts is a mutual bet or wager, for, although B and C are pitted against each other in interest, there is no privity of contract, and they may be utter strangers. Obviously the mutual betting or mutual wagering contract wherein A and B each risks two dollars under an agreement with each other is fundamentally unlike the arrangement by which A fortifies himself against risk and passes the hazard to B and C.

Now suppose A sets up a table at a race track and accepts bets or wagers from all who choose to deal with him. He gives a tab to each patron and records by appropriate entry all of the contracts thus made, including the name of each horse, and the odds that are given. Thus A becomes a dealer in mutual bets or wagers. He fixes the odds for his own benefit, but he may win or lose on any contract. A is a bookmaker. Enc. Britt., 14th ed., 10:11; *People* v. *Laude,* 81 Misc. 256; 143 N. Y. S. 156; 27 C. J. 981.

Second—Historical Background.—The nature of the scheme called lottery in 1874 may now be examined. At that time the Missouri Lottery persisted, in spite of the Missouri Constitution of 1865. "Flexible Participation Lotteries," by Francis Emmett Williams, p. 8. The Literary Lottery in Kentucky was active. Asbury's

"Sucker's Progress," p. 84. To the south the Louisiana State Lottery was siphoning cash from Arkansas and other states, using the United States mails for convenience. These lotteries all operated under the same contract pattern. The offeror or operator would promulgate a plan for sale of a designated number of tickets at a fixed price. Cash receipts would be sufficient to pay prizes, pay all expenses, and leave a generous margin of profit. The operator merely sold chances in the scheme, assuming no risk of loss. There was privity of contract between operator and ticket holders, but between purchasers themselves privity was lacking.

Because bookmaking is of English origin, and is older than either the pari-mutuel or pool system, English courts have dealt with both. Since many of our laws came from England, it follows that importance attaches to what our overseas cousins learned concerning the two types of contracts here reviewed. A summary of excerpts from decisions, and comments by Howard A. Street—an eminent English lawyer-author—will prove helpful.[1]

At page 50 Mr. Street says: "A wagering contract —though a contract *at odds*—is a peculiarly English invention, and found its way into English law as a legal method of deciding disputes. But it came to be known as 'an English way of settling a controversy' without litigation. . . . In 1878 Cotton, L.J., said, 'The essence of gaming and wagering is that one party is to win and the other to lose upon a future event, which at the time of the contract is of an uncertain nature—that is to say, if the event turns out one way A will lose, but if it turns out the other way he will win.' "[2]

Perhaps the more generally accepted English law definition of wagering contract is the one laid down in

[1] An introduction to Street's Law of Gaming is: "The law of gaming is a jig-saw puzzle. The author's aim has been, shirking no difficulty, to find a rational explanation of it. To do this it was necessary for him to go back to the earliest statutes and decisions. He has read, and re-read every decision which he has cited—about 1,600, including Irish and Scottish."

[2] Street's citations are to *Thacker* v. *Hardy*, 4 Q. B. D. 685, 695; *Carlill* v. *The Carbolic Smoke Ball Co.*, (1892) 2 Q. B. 484, 490; on appeal, (1893) 1 Q. B. 256.

1892 by Hawkins, J., who said in part: "It is essential to a wagering contract that each party may under it either win or lose, whether he will win or lose being dependent on the issue of the event, and therefore, remaining uncertain until that issue is known. If either of the parties may win but cannot lose, or may lose but cannot win, it is not a wagering contract."

Pools, totalizators, and coupon competitions were unknown in 1853; but, says Street, p. 69, "Distribution without loss to the distributor is an element common to sweepstakes, pool, some coupon competitions, and totalizators, and the same principle [eliminating possibility of loss to the distributor] must or should apply to all. . . . No [automatic] machine (p. 87) can be an instrument of [mutual] betting, unless it involves risk of loss to the owner and to the players. . . . Transactions with a totalizator do not in England (p.88) involve betting between the machine and contributors. . . . It may be said that the two most essential features of a totalizator are (1) that no loss or gain is involved to the machine, [and] (2) 'that the odds are determined on the conclusion of the betting by the total amount of money staked on the several horses by the backers' "[3]

Where §15 of the Finance Act of 1926 (16-17 Geo. 5, c. 22) imposed a duty on all bets with bookmakers, it was held that the Luncheon and Sports Club, [as to its ownership and operation of a totalizator] was not subject to the duty because the Club could neither win nor lose. This italicized proposition is stated by Mr. Street: "The relation of 'pool' to betting is not distinguishable from that of totalizators, . . . [and] it is submitted that 'pool betting' is no more clearly a type of betting than 'water polo' is a type of polo, and that the phrase is misleading. It was restricted by a section of the 1934 statute (24-25 Geo. 5, c. 58, s. 3 (1), (2). . . . A sidenote suggests that it is a species of pari-mutuel transaction. Its character is, however, a matter of common knowledge, and it is probably correct to say that it differs from a totalizator only in that a human agent takes

[3] Per Hanworth, M.R., in Att'y-Gen. v. Racecourse Betting Control Board, (1935) 1 Ch. 34, 52.

the part of the machine. It is superfluous to add that the term has no connection with the game of 'pool' nor with the 'pool' or 'jackpot' formed by successive contributions, as in many card games. It follows from what has been said as to totalizators that entrants to a pool do not bet with the organizer".

Third — Lotteries and Bookmaking. — Having seen some of the basic differences between a mutual bet, mutual wager, or betting contract, on the one hand, and the contract in pools, totalizators, some coupon competitions, and sweepstakes or other lottery schemes on the other, it is in order to note the time and the circumstances under which the lottery contract came into use as a medium for race track gambling in competition with bookmaking.

It is true that one writer in the Encyclopedia Britannica places the origin of pari-mutuel gambling at Paris, France, in 1872. (14th Ed. 22:314). However, another writer in the same work tells us the system was in use at all the race courses in France in 1866 (Enc. Brit. 10:11). In "Thoroughbred Racing and Breeding," a prominent sports writer fixes 1865 as the beginning of this type of race gambling. Furthermore, in *Tollett* v. *Thomas*, an English case decided in 1871 (L.R. 6 Q.B. 514), a machine for recording bets on races was involved. (See Street's Law of Gaming, pp. 88, 89, 205, 245). The court called it a totalizator, although it was a small and crude contrivance that a man could carry. From these authorities it would appear that 1865 is an approximately correct date for the beginning of a system from which have sprung the many variations known as "pari-mutuels," "pool selling," "French pool," "combination pools", etc.

If this be the true date, then it may be said that in 1865 Pierre Oller, keeper of a perfume shop in Paris, installed in an open shed, a table, a record book, and blocks of tickets for the coming horse race. Pierre had a grudge against bookmakers. He thought they swindled customers on required odds. His idea burgeoned something like this: "Why not give the suckers a better deal

on odds? Why shouldn't I take for myself a percentage of all money received and award the balance to the backers of the winning horse?" This was the gist of Pierre's plan and the principle upon which all "pari-mutuel" gambling operates. (See Thoroughbred Racing and Breeding, p. 185. Enc. Brit. 22:314. 38 C.J.S. 47).

This horse gambling method was unlike mutual betting in bookmaking. Pierre made no mutual bets or wagers. He simply sold chances in a scheme. His contracts were half bets—that is, a win-or-lose relationship for acceptors at their end as in a lottery, and a sure thing for Pierre at the other, as in a typical lottery. Patrons were pitted against each other; but there was no privity of contract between or among them. Pierre was neither bettor nor trustee. See Wise v. Ass'n (Del.), 45 A. 2d 547). His patrons had no equitable interest in the stakes he received. He was not a real stakeholder. If he sold a thousand tickets on a dozen different horses, the system merely involved that many agreements—common, ordinary contracts under which Pierre would operate a certain gambling plan tied to the results of a certain race.

France had known many lotteries in government finance and in religious and charitable enterprises, but her parliaments frequently protested their use. Great men like Turgot, Condillac and the Bishop of Antun had denounced them. And although lotteries for charity and the fine arts had been authorized in 1844, the Royal Lottery had been discontinued in 1836, ten years after government lotteries ended in England. (Enc. Brit. [9th ed.] 15:11).

By reason of this situation in France, and because England in 1826 had suppressed her crown lotteries, (while a strong anti-lottery wave swept the United States between 1820 and 1860), it was hardly advisable for Pierre Oller or his associates to permit any suggestion of lottery contracts or lottery tickets to be linked with his scheme. At any rate Oller et als referred to his system as "bookmaking." One sales contract was a *pare mutuel,* the French term for a mutual bet or mutual wager.

The plural, *paris mutuels,* meant mutual bets or mutual wagers. (See "pare mutuel" in any good dictionary.) From that day to this, beginning with Pierre Oller, seekers of easy money have been operating race lotteries in the guise and nomenclature of the bookmakers' mutual betting system.

The history of Oller's scheme in the United States will be better understood in the light of certain known facts. At the time the scheme originated, race track gambling was in the hands of the bookmakers who looked upon Oller with disfavor. Speaking generally, the scheme has made two invasions of this country: first in the 19th century—chiefly as a pool-selling system in gambling houses away from the tracks; and secondly, in the present century—as a system for gambling at the tracks through the medium of modern machines. The second invasion was more successful than the first, due largely to machines which have contributed speed and accuracy and a "color" of computative honesty, and to the backing of wealthy gambling promoters. Although all variations of Oller's plan are operated with lottery contracts, there remains this question: Accepting the universally-conceded proposition that a combination of prize, chance, and consideration constitutes a lottery, must the element of chance be restricted here to those forms of conventional uncertainty that were familiar to the constitution makers in 1874? In short, "Is the element of chance a matter of form rather than substantial fact?"

The first pool controversy appearing in the reports is the English case of *Tollett et al.* v. *Thomas* (1871), L.R. 6 Q.B. 514, where a small hand machine operated with keys and cranks automatically exhibited the total stakes on each horse and the grand total upon the registration of each individual stake. In *Commonwealth* v. *Simonds,* decided in 1881, (79 Ky. 618) a similar machine known as "French Pool" or "Paris-Mutuel" was in evidence. These contrivances were slow and crude, and added little to the progress or popularity of the Oller system.

In 1877, or just before that time, William Lovell tested the pooling system in New Jersey with *auction, French,* and *combination* pools. He took a "cut" of all stakes and handled prize money on the Oller plan. State v. Lovell, (1877) 39 N. J. Law, 458. In its opinion the court declined to restrict the meaning of "lottery" to conventional pure chance determinants, and pointed to some of the unpredictable uncertainties of a horse race, saying: "The physical condition of the horse and his rider, the fastenings of his shoes, the honesty of purpose that actuates his rider and his owner in running him, the state of the weather and the track, and these circumstances in the case of every horse that races against him, are all matters about which the judgment of the outside bettor can avail him no more than the arithmetical calculation of chances can avail the dice thrower." (1 c.p. 462)

Fourth—"Chance" as a Determinant.—To these recited uncertainties the court added another quotient that is unpredictable to all players except perhaps the last (assuming that only one player comes in at the last moment). It is the element of chance which determines *what* the winner is to gain. In auction pool this depends on *how much* others have played against him. In the other pools it depends on how *much* others play against him, and *how many others* play as he does. "None of the bettors," said the court, "save the last one, can possibly learn these matters." (1.c.p. 462). The court held that *chance,* not *skill,* controlled results of the horse race, and it affirmed defendant's conviction for conducting a lottery.

In 1881 Kentucky had two cases which should be noted, as they indicate the presence of pool-selling there at that time. In *Commonwealth* v. *Simonds* (79 Ky. 618, 620) there was involved a small hand machine called a *French Pool* or *Pari-Mutuel.* The Supreme Court treated the machine as a contrivance used in betting because the ticket-buyers could either win or lose; but it held that the operator of the machine was not guilty of gaming or betting, since he hazarded nothing. In other words, he

assumed no risk of loss in his contracts with the ticket-buyers.

In *Cheek* v. *Commonwealth,* 79 Ky. 359, the defendant's conviction for operating a disorderly house where pool-selling was conducted, was affirmed. At that time there was no statute against pool-selling; but the court declared that pool-selling *per se* was not a bet, or game of chance: reason:—the seller ran no risk. In its reasoning in these cases, the court was unconsciously making some of the distinctions between mutual betting contracts and lottery contracts.

In 1883 Michigan had a Constitutional prohibition against certain forms of gambling that had been adopted in 1835—a low penalty law against pool-selling, and a high penalty law against lotteries. In that year the Michigan Supreme Court reviewed two cases involving *French, auction,* and *combination* pools. The room where the scheme was consummated was declared a gambling resort. In *People* v. *Wiethoff,* 51 Mich. 203; 16 N. W. 442, 47 Am. St. Rep. 557, a conviction for pool-selling was affirmed in an opinion by Cooley, J. In *People* v. *Reilly,* 50 Mich. 384; 15 N. W. 520, 41 Am. St. Rep. 47, the defendant stood convicted of running a lottery. This case was reversed, not because pool-selling did not contain all the elements of a lottery, but because Campbell, J. thought Reilly's pool-selling did not have the "extensive reach" of the gambling enterprises of 1835 that were known as lotteries. In short, the prosecution was brought under the high penalty statute when it should have been under the low penalty law.

In 1887 the pool-selling movement scored a great victory when it got to the New York tracks under the authority of the famous "Ives Pool Act," (1887) N. Y. Laws, Chapter 479. It flourished without question for seven years, or until 1894, when three cases were decided by the New York courts. In *Irving* v. *Britton,* 8 Misc. 201; 28 N.Y.S. 529, the Act was declared a violation of the anti-lottery clause of the New York Constitution. In describing the Act in a scholarly discussion, Pryor, J., said in part: ". . . The process set forth is in

every essential a lottery. . . . It is a scheme for the distribution of property by chance . . . That the event of a race is a contingency dependent upon chance is a self-evident proposition. . . Not by principle only but by authority as well, we are sustained in the conclusion that pool-selling is a lottery . . ." (l.c.p. 531)

In the same month one of the Supreme Courts of New York (*Reilly* v. *Gray,* 77 Hun. 402, 28 N.Y.S. 811) took a contrary view. In the third case, *Ludington* v. *Dudley,* 9 Misc. 700, 30 N.Y.S. 221, the court mentioned *Reilly* v. *Gray,* but followed *Irving* v. *Britton.* The reasoning in the *Irving-Britton* decision was a severe blow to pool-selling in New York.

Appellees in their brief devote two pages to *Reilly* v. *Gray* in an attempt to bolster the contention that *pari-mutuel* betting does not violate an anti-lottery provision in a constitution. The logical answer to this appears to be that if *Reilly* v. *Gray* had been recognized as dependable law in New York the promoters of this form of gambling would not have gone to the trouble and expense of securing an amendment specifically exempting the pari-mutuels from the anti-lottery provision in the state constitution. (Amendment adopted November 7, 1939, effective January 1, 1940).

Fifth—Some of the Decisions.—Two pages of appellees' brief deal with another New York case, *People ex rel.* v. *Fallon* (1897), 152 N. Y. 12, 46 N. E. 296, 57 Am. St. Rep. 492, 37 L. R. A. 227. Their assertion is that it was a test "as to whether betting on horse races constituted a lottery." But they have followed dicta and misapplied the Fallon holding. Abbott's Consolidated New York Digest, Volume 23 at page 561, summarizes the decision as follows: "A racing association permitted owners of horses to compete for a purse to be furnished by the association. Each person who entered a horse was required to pay an entrance fee, which became the property of the association. The purse was contributed by the association, without reference to the entrance money. *Held,* that the transaction was not within Pen. Code, tit.

10, c. 8, forbidding lotteries." Obviously this Fallon case was not, as Appellees contend, "a test as to whether betting on horse races constituted a lottery."

In 1888 John Boyland of Baltimore sold tickets which bore the heading, "Horse Combination." They were endorsed, "Decided to be legal by the highest tribunal in the State of Maryland." Boyland was indicted in three separate counts charged with unlawfully selling a lottery ticket to one Maria Clagett, unlawfully keeping a room for the purpose of selling lottery tickets, and knowingly permitting a room of which he was the owner to be used as a place for selling lottery tickets.

Boyland's defense was that he was betting on horse races and not vending lottery tickets. In affirming a conviction the Court of Appeals of Maryland said: "The real and only question presented to us, is whether the appellant can legalize an illegal act by calling it by another name, and that all the courts of justice in the land are bound to regard the act itself what he may chance to *call it*. If such be the law the Courts of criminal jurisdiction may as well be closed. The heading and endorsement on these tickets were a patent effort to evade the law against selling lottery tickets, the tickets were clearly admissible in evidence, and the jury had the undoubted right, disregarding the name and endorsement printed on them by the appellant, to find them what they really were, lottery tickets and not what they professed to be, tickets upon a horse combination." (*Boyland* v. *State,* 69 Md. 511, 16 Atl. 132).

At the time this case was decided the Maryland Constitution of 1867, Article 3, Section 36, contained this language. "No lottery grant shall ever hereafter be authorized by the General Assembly". This clause, and the decision in *Boyland* v. *State,* presented such obstacles to the so-called *pari-mutuel* system of race track gambling that the promoters of the scheme backed a constitutional amendment to insure legality. (Amendment proposed in 1935 and submitted to voters in 1938.)

The twentieth century has been productive of nine or ten cases that are cited in connection with a controversy of this kind. Only about half have direct bearing on the issues here.

In *Utah* v. *Green* (1926), 68 Utah 251, 249 Pac. 1016, the question was whether the Horse Racing Act of 1926 (which purported to authorize "pari-mutuel betting") was in conflict with Article 6, section 28, Constitution of 1895, prohibiting "any lottery" and "any game of chance." Evidence showed that this section had been blocked in the Constitutional convention until objectors were assured that it was not designed to interfere with betting on horse races. The Court agreed to this predetermined exemption, as such.

In Pompano Horse Club v. State ex rel. (1927), 93 Fla. 415; 111 S. 801, 52 A. L. R. 51, suit was under statutes against gambling and games of chance. It was sought to restrain and abate a *pari-mutuel* system operated in connection with horse races and under the same management. The matter of lottery was not raised. The Court held that, regardless of whether the race itself is called "a game of skill" or "a game of chance," the *pari-mutuel* process which uses the result of a race as a determinant, is gambling and constitutes a game of chance. This decision is in accord with the weight of authority. See 52 A.L.R. annotation, l.c. 74.

In Nebraska in 1929, Article 3, section 24 of the Constitution of 1875, barred lotteries, and statutes prohibited lotteries and games of chance. There was a proceeding to restrain the *pari-mutuel* system of gambling at an Omaha track. The Supreme Court held that the Constitution and statutes use the word lottery in its popular sense; that the system attached contains the elements of prize, chance, and consideration, and that in operation it was a game of chance—a criminal lottery. State v. Ak-Sar-Ben Exposition Co., 118 Neb. 851; 226 N. W. 705.

In 1931 an important case came before the high court of Kentucky (Commonwealth v. Kentucky Jockey Club, 238 Ky. 739, 38 S. W. 2nd 987). It was initiated by

Attorney General Cammack, who challenged *pari-mutuels* as lotteries under an anti-lottery clause of the Constitution of 1870. It was shown that when the Colonels of Kentucky had this clause of the Constitution under consideration, there was a gentlemen's agreement that it should never interfere with their right to put money on the ponies at the tracks. This convention-construction of negative intent was upheld by the Court of Appeals.

Illinois furnished a case for 1932. The Constitution of 1870, Article 4, Section 27, prohibited authorization of lotteries. A legislative Act of 1927 approved the *pari-mutuel* or *certificate* system of wagering at race tracks. In People v. Monroe (1932), 349 Ill. 270, 85 A. L. R. 605, 182 N.E. 439, the Supreme Court in a test case held that in such a system the chance is not pure and the system was not a lottery. In the case at bar the majority quotes from the Monroe opinion in which the Illinois tribunal attempts to deny some unguessable uncertainties of the *pari-mutuel* system, saying: "While the amount of money to be divided is indefinite as to dollars and cents, it is definite in that the amount of money to be divided is the total stakes on the winning horse, less a percentage to the management. The persons among whom the money is to be divided are not uncertain, as they are 'those who bet on the winning horse' ". 182 N.E. l.c. 442.

Sixth—Judicial Ingraftation.—It is to be seen that the amount of money to be divided is *uncertain,* but that the *manner* in which it is divided is *certain;* that the persons among whom the money is to be divided are *uncertain,* but that the *manner* in which it is to be divided among "those who bet on the winning horse" is *certain.* This appears to be a judicial process of ingraftation or consolidation, wherein chance-certainty is crossed with uncertainty for the theoretical elimination of wager casualty.

In 1935 the case of *Panas* v. *Texas B. & R. Ass'n,* 80 S.W. 2nd 1020, was before the Court of Civil Appeals at Galveston. Two years previously the Legislature had passed an Act purporting to legalize a *certificate* sys-

tem of gambling at the tracks. When a citizen sued to enjoin operation on the ground that the Act violated the anti-lottery section in the Constitution of 1870, and the gaming statutes, the Court held that lotteries and betting on horse races, being under separate statutes, were not "games" within the purview of the gaming statutes and that the citizen could not sue because no "*gambling house*" was involved. The Court brushed off the Constitutional question with the suggestion that since the Legislature did not consider the "system" a lottery it was not a lottery. This method of handling a constitutional question is not entirely new. It reflects a willingness by Judges to follow non-resistant lines, and is a species of official abnegation of responsibility not likely to appeal to unselfish citizens.

In 1939 *Engle* v. *State* was decided in Arizona (53 Ariz. 458, 90 Pac. 2nd 988). The State did not have a constitutional mandate against lotteries; but the Code of 1928 contained a public nuisance provision in connection with each of the specific offenses of lotteries, banking games, games of chance, and disorderly houses. In addition, there was a general public nuisance statute. The defendants ran a house in which they met all comers with mutual wagers on horse races outside of Arizona, at "odds" cast up by the pari-mutuel machines wherever such machines were in operation. Convicted of maintaining a nuisance under the general statute, the defendants on appeal insisted that their conduct should have been tied to one of the *specific* statutes. The Supreme Court affirmed the conviction. It was shown that the Arizona violations involved bookmaking contracts, although based on totals cast up by out-of-state machines. In discussing lotteries the court adopted the *dominant chance doctrine* and *not* the *pure chance* doctrine. Although this case was inadvertently cited by the Supreme Court of Michigan, *Rohan et ux.* v. *Detroit Racing Ass'n, et al.* (1946) 314 Mich. 326, 22 N.W. 2nd 433, 166 A. L. R. 1246, as sustaining the *pure chance* doctrine, it does not afford such support.

In 1946 the Supreme Court of Michigan in the *Rohan* case, *supra,* held squarely that the *pari-mutuel*

system of gambling on horse races was not a lottery within the meaning of the Constitutional provision of 1835. Judge Francis Emmett Williams of St. Louis, who has written much on the subject of lotteries, and in respect of whose highly analytical publications and finely expressed conclusions the writer of this opinion acknowledges an indebtedness, criticises the opinion in that in the course of years the Court had frequently placed the lottery tag on schemes that were unknown in 1835 or had departed from the conventional lottery pattern of that day, including a deviation from the pure chance doctrine itself. Judge Williams thinks the Court ignored rules of construction it had previously adopted in lottery cases. (See "The Lawyer and Law Notes," Fall Issue, 1946, p. 12). Judge Williams commends the trial judge who found that *pari-mutuel* gambling was the equivalent of the mass gambling aimed at by the Constitution; that under the scheme players must guess at unpredictable uncertainties, so that financial return upon the winning horse is entirely beyond the power of any individual to fix—a matter of the purest chance; that the gambling system is inconsistent with the state's public policy; that it is hypocritical and illogical, and that neither the Courts nor the Legislature had a right to put the State into the immoral business of gambling.

The opinion in the Michigan case assumes and argues that the "skill and judgment of the patrons" in the selection of horses is sufficient to take *pari-mutuel* out of the lottery class. If this be true, the question might be asked, Why is it that no patron is ever able to exercise enough "skill and judgment" to make a success of playing the races? Why the saying, "You may sometimes win a race, but you cannot beat the races?" Paul Gallico was not far wrong when he said, "There are only a few ways to win a race, but there are 87 ways to lose." As a matter of fact, whatever skill there is in this form of gambling is only a thin veneer to mislead Legislatures and Courts. The overwhelming majority of those who are induced to patronize pari-mutuels make their selections as in a guessing game.

In a guessing gamble of a slightly different type the Supreme Court of Missouri, all concurring, held that since hope of winning was held out to the general public, whether *chance* or *skill* is the determining factor in the competition must depend upon the capacity of the general public—not experts—to solve the problems presented. *State ex. inf.* v. *Publishing Company,* 341 Mo. 862, 110 S. W. 2nd 705; 710, 717. See also, Donaldson v. Magazine, 68 S. Ct. 591.

In the latest case on the subject (1947), Opinion of the Justices, 31 So. 2nd, 753, 249 Ala. 516, the decision of a majority of the Alabama Supreme Court upheld the Alabama Constitution against pari-mutuels. The syllabus in the Southern Reporter reads as follows: "A proposed act, providing for pari-mutuel and bookmaking methods of wagering on horse and dog races, violates the constitutional prohibition of 'lotteries or schemes in nature thereof', as amount recovered by one betting on winning horse or dog is *purely matter of chance.* (Emphasis supplied).

Seventh—Thin Veneer of Skill and Judgment.—In an article in "The Lawyer and Law Notes" heretofore referred to, Judge Francis Emmett Williams reviews the pure chance doctrine in English and American cases and comes to the conclusion that it has been practically abandoned in England and that it survives in this country only in some of these *pari-mutuel* cases. This conclusion seems logical; for why should lotteries, in substance and in fact, be permitted to evade the law simply because they have been veneered with a film of skill and judgment?—a veneer so frequently punctured that its utility proves nothing that can by any stretch of the imagination lend dignity to the position of a State where strained construction perpetuates the public in a partnership with ungovernable greed.

But let us again advert to the lotteries of earlier days. The Constitution singled them out from other forms of gambling. Why? The answer must be "because of their nature". The Supreme Court of Michigan distinguished them by their "extensive reach". *People* v.

Wiethoff (1883), 51 Mich. 203, 16 N. W. 442, 446, 47 Am. Rep. 557. The Supreme Court of the United States referred to them as "a widespread pestilence [that] "infests the whole community, . . . enters every dwelling, . . . reaches every class, . . . preys upon the hard earnings of the poor, . . . [and] plunders the ignorant and simple." *Phalen* v. *Virginia,* 8 How. (U. S.) 163, 168, 12 Law Ed. 1030, 1033.

In its "extensive reach", and its "appeal to every class", the lottery system has prospered through public contributions because of the facility with which it functions—the use of tickets. Tickets were the earmark of appeal that set the lotteries of 1874 apart from mutual betting at the races, and in respect of other forms of gambling. That the framers of our Constitution had these things in mind when they inveighed against lotteries is made certain by their prohibition against the sale of lottery tickets. In the early days large numbers of lottery tickets would be printed and sent by mail to agents who sold them. This made it unnecessary for the ticket-holder to be present at the *drawing.*

The proponents of today's lotteries have their printing presses operating on the ground. With lightning rapidity the complicated mathematical computations are made. More tickets are sold at Oaklawn in a single afternoon than were disposed of in a week for the lotteries prior to 1874. The use of tickets as "chances" facilitates mass gambling on a scale of such magnitude that the State itself boasts of the easy money it receives as a portion of patron losses, while in other departments Prosecuting Attorneys and their deputies are prosecuting players who wager on the turn of a card or the erratic roll of dice.

Mr. Justice R. W. Robins joins in this dissent.

4-8852 219 S. W. 2d 429

Opinion delivered April 11, 1949.

[redacted]

Wm. J. Kirby and *U. A. Gentry,* for appellant.

House, Moses & Holmes, for appellee.

MINOR W. MILLWEE, Justice. Appellant, Manie Schuman, owns four vacant lots in Springdale Addition to the City of Little Rock, Arkansas. The lots are 50 feet wide and 100 feet long and face south on "O" Street. In the latter part of 1945 appellees, Redding Stevenson and George Wittenberg, operating as S & W Development Co. constructed a sewer line running east and west across the north end of appellant's lots about 30 or 35 feet south of the north lot lines. The sewer line was

constructed to serve a residential area being developed by Stevenson & Wittenberg and connected with the city's line west of appellant's property. The line was built across appellant's lots without his knowledge or consent and by mistake, it being the intent to place the line in the alley to the north.

Appellant learned of the construction of the line shortly before its completion. He testified that when he first discovered the work being done, about five feet of pipe remained uncovered on his lots; that a few days later he made complaint to appellee Wittenberg, who told him that the line might be about ten feet over on appellant's lots, but it would enhance the value of the lots and appellant could connect any buildings he might construct on the lots to the line; that he neither agreed nor disagreed to what Wittenberg told him; and that he knew at the time of the conversation that the line was on his lots, but did not know its exact location. He made no further complaint until the spring of 1948 when he learned that the F.H.A. would not approve a loan for the construction of a home on the property because of the location of the sewer line.

Appellee Wittenberg testified that at the time appellant first complained of the construction of the line there was no express agreement as to whether the line should remain or be moved, but that he and appellant had a friendly understanding that appellant's lots would be cleared off to his satisfaction and that appellant would be permitted to connect any future construction on the lots to the sewer line. He also testified that at the time of his conversation with appellant, construction of the sewer had been completed with the exception of some finishing work west of appellant's lots where some of the pipe had not been covered and some leveling off of the ditch that remained to be done; that it was a year or 18 months after this conversation when appellant's son-in-law made complaint about the location of the line and his inability to secure a loan from the F.H.A.

Mr. Wittenberg also stated that in order for appellant to have sewer connections before the line was built, he would have had to build his own line for a distance

of from 750 to 1,000 feet, which would have been extremely expensive and that the presence of the line in controversy enhanced the value of appellant's lots.

After the sewer line was completed by Stevenson & Wittenberg, it was transferred to appellee, Little Rock Sanitary Sewer Committee, for operation and maintenance under an arrangement whereby the committee charged a fee to property owners connecting with the line to reimburse the builders.

Appellant filed this suit on May 28, 1948, seeking a mandatory injunction to require appellees, Stevenson & Wittenberg, to remove the sewer line from appellant's property.

In their answer appellees pleaded the execution of an oral agreement for an easement based upon a valuable consideration; that said agreement was relied on by appellees; and that appellant stood by for approximately two years thereafter without objection, knowing that appellees would expend large sums of money to complete the sewer, and thereby acquiesced in completion of the line, at additional expense, which conduct on the part of appellant created an equitable estoppel barring him from the relief sought.

Appellant filed a reply to the answer pleading the statute of frauds as a defense to the alleged oral agreement for an easement.

After trial a decree was rendered in favor of appellees and the complaint of appellant was dismissed for want of equity.

There is little dispute in the evidence which shows that the sewer line was placed upon appellant's lots by mistake and without his knowledge or consent, but that as construction was nearing completion, appellant tacitly agreed that the sewer line might remain on his lots in consideration of appellees' promise to clear and level the lots and the further right of appellant to connect with the sewer line free of the usual charge, if houses were later constructed on the lots.

For reversal of the decree appellant contends that the right to construct and maintain the sewer line, or the oral agreement to allow it to remain on his land, constituted an easement which could not be consummated except by deed and that the oral agreement, if made, amounted to a mere license which was revocable at will.

It is appellees' contention that appellant, by his words and conduct, granted an easement in the nature of an executory contract which was in effect a future grant of an easement fully performed, and thereby taken out of the operation of the statute of frauds; also that appellant is estopped by his own conduct from asserting his right to revoke the oral agreement.

Both parties rely on the early case of *Wynn* v. *Garland,* 19 Ark. 23, 68 Am. Dec. 190, which has been frequently cited in this and other jurisdictions. There the owners of unsurveyed adjoining lands orally agreed to dig ditches for the purpose of draining their lands and constructed a main ditch as a boundary line between them. Later the lands were surveyed by the government and one of the parties closed the ditch in violation of the oral agreement and threw up an embankment so as to back the water upon the land of the other party. It was held that the agreement between the parties was in the nature of a license which, having been accepted and acted upon, could not be disregarded; that full performance on the part of plaintiff made it an executed contract; and that defendant had no right to close the ditch. It was there said: "An easement, in contradistinction to a *simple* or *voluntary license,* is defined to be, a liberty, privilege, or advantage, which one man may have in the lands of another without profit, and it may arise by deed or prescription. . . .

"From this definition of an easement it follows, therefore, that it can only be communicated by deed, or other instrument in writing, or by prescription, and as a consequence, unless it be claimed by prescription, the privilege, under the statute of frauds, must be evidenced by deed, or some other writing. . . .

"Notwithstanding the grant of an *easement* is embraced within the operation of the statute of frauds,

and therefore must be in writing, yet it has been holden, that a parol grant executed will be upheld and sustained under the same circumstances, and on the same principle, that a parol contract for the sale of land would be. . .

"Besides this, where there has been given a parol license of a privilege amounting to an easement, and where the enjoyment of it must necessarily be preceded by the expenditure of money or capital, or where the grantee has made improvements, in good faith, under the grant, or invested his capital in consequence of it—under these circumstances the grantee becomes a purchaser of the easement granted by parol for a valuable consideration, and consequently will be entitled to have it specifically performed in equity, unless the party will re-imburse him in his expenditure, or pay him for his improvements, provided this will put the grantee *in statu quo.* See *Sheffield* v. *Collier,* 3 Kelly (Ga.) Rep. 84 *et seq., and the cases cited above.*" See, also, *Walker* v. *Shackleford,* 49 Ark. 503, 5 S. W. 887, 4 Am. St. Rep. 61; *Belser* v. *Moore,* 73 Ark. 296; 84 S. W. 219; *Allison* v. *Schweitzer,* 144 Ark. 123, 221 S. W. 454.

Appellees also rely on the case of *Allison* v. *Schweitzer, supra,* where, pursuant to oral permission given by appellant, appellee built a wall two inches over the dividing line so as to touch appellant's wall, and appellant stood by with knowledge that appellee was expending money and labor in the erection of the wall in reliance on the oral agreement. The court said: "Upon the merit of the case, it may be said that the question presented is not that of the enforceability of an executory parol contract for an easement. Appellee is in possession of the land in dispute, and the question is, 'Can appellant be heard to say that no easement exists?' In 9 R. C. L., at page 746, it is said: 'It is recognized, however, that, though a grant of an easement is embraced within the operation of the statute (of frauds), and must, therefore, be in writing, yet a parol grant executed will be upheld and sustained under the same circumstances and on the same principle that a parol contract for the sale of land would be.' Among the numerous cases cited in the note to the text quoted are our own

cases of *Wynn* v. *Garland,* 19 Ark. 23, 68 Am. Dec. 190, and *Walker* v. *Shackelford,* 49 Ark. 503, 5 S. W. 887, 4 Am. St. Rep. 61. See, also, *Salyers* v. *Legate,* 93 Ark. 606, 125 S. W. 1010, 137 Am. St. Rep. 107; *Rudisill* v. *Cross,* 54 Ark. 519, 16 S. W. 575, 26 Am. St. Rep. 57."

The facts in the case at bar do not bring it within the principles announced in the above cases. Appellees built the sewer across appellant's land without his knowledge or consent. They entered upon the lots as a trespassers and not in reliance upon any agreement with appellant, oral or written. The construction of the sewer and the expenditures by appellees were not made under a parol grant with the knowledge and consent of appellant. It is true that appellant reneged on the oral agreement he tacitly made for the sewer to remain on the lots after learning of the trespass, but the outlay of money in construction of the sewer occurred prior to the agreement and not as an inducement thereto. While appellees alleged in their answer that they expended large sums of money to complete the sewer after appellant impliedly agreed that it might remain on his property, there was a failure of proof to substantiate this allegation. The effect of the candid testimony of appellee Wittenberg is that the construction was nearing completion at the time of the agreement and only a small amount of work was done thereafter.

The facts here, considered in their aspect most favorable to appellees, show an oral agreement amounting to a mere license to allow the sewer to remain on the land of appellant after the work had been substantially completed. There is considerable division among the authorities as to whether a parol license to do an act on the land of the licensor remains at all times revocable at his option, or whether such license becomes irrevocable where the licensee has entered under the parol license and expended money or labor with the knowledge and acquiescence of the licensor. 33 Am. Jur., Licenses, §§ 103 to 105. At § 103 the textwriter says: "The cases holding to this rule as to irrevocability of certain licenses proceed on two distinct theories, one theory being that when the licensee expends large sums of money in making

the improvement, and such expenditure is made without opposition by the licensor, the license becomes executed and, as such, irrevocable; and that, in fact, what was at its inception a license becomes in reality a grant. The other theory and the reason most frequently given is that after the execution of the license, it would be a fraud on the licensee to permit a revocation; and the principles of equitable estoppel are invoked to prevent what would work a great hardship in many instances. This is especially true where a licensor not only grants the right to the licensee to go on his land but joins in the enterprise and accepts the benefits of the licensee's labor and expense.

"Of course, where there has been no expenditure on the faith of the license, there is no foundation for an estoppel, and the same reason does not exist for holding it irrevocable, even though it is executed. . . . The rule of irrevocability will not apply to a mere naked license predicated on an invasion of another's right, and which is in effect a trespass on his property; and this is true even when money has been expended in improving the property, under a belief that the uninvited use relied on will never be interrupted." See, also, Anno. 49 L. R. A. 497.

The rule of irrevocability finds support in *Wynn* v. *Garland, supra,* but, as previously pointed out, the entry and expenditures in the instant case were not made under and on the faith of the license, and support for the doctrine of estoppel is, therefore, lacking. Before a party will be estopped, it must be shown that the party relying upon estoppel is put at disadvantage by the action of the party sought to be estopped and has been thereby led to change his position for the worse. *Fox* v. *Drewry,* 62 Ark. 316, 35 S. W. 533; *Norton* v. *Maryland Casualty Co.,* 182 Ark. 609, 32 S. W. 2d 172. The case of *Pocahontas Light & Water Co.* v. *Browning,* 53 W. Va. 436, 44 S. E. 267, involved facts similar to those here and the court held: "A representation, admission, or act after the party's position has been changed will not avail as grounds for estoppel, because it cannot have been acted on."

We, therefore, hold that the license for the sewer to remain on the premises is revocable by appellant, but this does not necessarily mean that he is entitled to the extraordinary remedy of a mandatory injunction against appellees, Stevenson & Wittenberg, for removal of the line from appellant's property. The proof shows that after appellant impliedly agreed for the sewer to remain on his property, it was turned over to appellee, Little Rock Sanitary Sewer Committee, a public agency charged with the operation and maintenance of the sewer, and placed in use. Other owners in the vicinity have doubtless connected their properties with the line, and it is not shown whether the line can be removed from appellant's lots without serious inconvenience, expense and disruption of service to these owners.

Equity should refuse to issue a mandatory injunction, even though an admitted legal right has been violated, where it appears that the intervening rights of the public should be considered and the issuance of the injunction would cause serious public inconvenience or loss without a correspondingly great advantage to the person seeking it. If such is the situation here—and the proof on this phase of the case has not been fully developed—appellant should be relegated to his remedy for damages resulting from the construction of the sewer on his premises.

The decree is accordingly reversed, and the cause remanded with directions to the trial court to determine whether a mandatory injunction should issue and, if not, to proceed with the determination of the damages, if any, sustained by appellant by reason of the construction of the sewer on his property.

PERDUE *v.* ROYSE.

4-8722 219 S. W. 2d 434

Opinion delivered April 11, 1949.

[redacted]

O. W. (Pete) Wiggins, for appellant.

Earle W. Moorhead, S. Hubert Mayes and *William H. Donham,* for appellee.

ROBINS, J. Appellant sued appellee for $1,533.54 which she alleged was due her (under § 9084, Pope's Digest) for overtime work done by her as a waitress for appellee. Appellee's answer was a general denial and plea of accord and satisfaction. A jury found issues in favor of appellee and from judgment on the verdict this appeal is prosecuted.

Appellee has filed a motion to affirm for non-compliance with Rule 9 of this court, in that appellant has failed to make and file abstract as required by this rule. This motion must be granted.

The motion for new trial contains eight paragraphs and as abstracted reads: "Motion for a New Trial provides: The verdict of the jury is contrary to the law, facts; the law and facts. The court erred in its instructions to the jury, etc."

No abstract of the instructions given by the court has been made. Two instructions given at the request of appellee, and thought by appellant to be erroneous, are copied in the argument portion of appellant's brief. Other instructions were given, but without a search of

the transcript we have no way of knowing whether the instructions, as a whole, correctly presented the case to the jury.

We have uniformly held that where, as here, there is no record error in the judgment appealed from, it must be affirmed when appellant fails to file proper abstract and same is not supplied by appellee. *Crouch* v. *Gilbert,* 210 Ark. 885, 198 S. W. 2d 72; *Pool* v. *Shuffield,* 213 Ark. 975, 214 S. W. 2d 223.

The judgment is affirmed.

VAN BIBBER *v.* HARDY.

4-8826 219 S. W. 2d 435

Opinion delivered April 11, 1949.

Claude F. Cooper and *Frank C. Douglas,* for appellant.

Holland & Taylor and *Marcus Evrard,* for appellee.

Ed. F. McFaddin, Justice. Appellants prosecute this appeal from a decree (1) awarding appellee Hardy $3,000 for breach of warranty; (2) refusing appellants a judgment against appellee Little; and (3) refusing to allow appellants a foreclosure.

In July, 1945, appellants, T. H. Van Bibber and Velma Louise Van Bibber, his wife, through the efforts of Tom Little, a real estate broker, agreed in writing

to sell Alvin Hardy certain real property in the City of Blytheville. There was a two-story building on the property. The ground floor was leased to George Stilwell at a rental of $100 per month; and the second floor was used as a hotel by Mrs. Van Bibber. The sales contract stated, *inter alia*:

"All rents to go to the purchaser after August 1, 1945.

"It (is) understood by both parties that the ground floor of this buliding is now leased till September 1st, 1946. And (at) which time the purchaser can get possession. The seller agrees to vacate her personal and household goods in thirty days from date."

The total contract price was $20,000, of which amount $7,000 was evidenced by a lien note executed by Hardy to the Van Bibbers, due in installments of $100 each month, and with the option given Hardy to pay the entire balance at any time. On July 19, 1945, in keeping with the sales contract, the Van Bibbers executed to Hardy a general warranty deed, but in which the covenant of warranty made no mention of Stilwell's possession or contractual rights concerning the ground floor of the building.

After delivery of the deed, Stilwell regularly paid his rent to Hardy for several months, and then demanded an extension of his lease of the store building for three additional years, exhibiting to Hardy the original 1943 lease contract between Stilwell and the Van Bibbers, which read in part: "This lease is for a period of three years from September 1, 1943, and the rental price is $1,200.00 per year, payable in monthly installments of $100.00, payable in advance, and second party is given the privilege of renewal of said lease for from one to three years,[1] at the same rental and upon the same general terms."

Hardy paid Stilwell $3,000 in order to obtain possession of the ground floor store building on September

[1] The parties to this litigation have treated this language as definitely giving Stilwell the right to an extension for three years, so we forego any discussion as to whether such was the enforcible meaning of the language.

1, 1946; and then Hardy filed this action against the Van Bibbers for breach of warranty, claiming that it had been represented to him that he would get possession of the ground floor on September 1, 1946, and that the Van Bibbers had contracted with Stilwell that he might have an extension, and that the $3,000 was the amount of the damages for the possession of the store building from September 1, 1946, through the period of the contractual extension held by Stilwell.

In defending the action, the Van Bibbers claimed that Hardy had known, all the time, that Stilwell had the right to a three-year extension, and that Hardy made monthly payments to the Van Bibbers after knowing of the Stilwell contract, and after having paid Stilwell the $3,000, thereby creating an estoppel against Hardy. The Van Bibbers also alleged that Hardy was in default in his monthly payments on the note, and prayed a foreclosure of their lien. The Van Bibbers made Tom Little a cross-defendant, alleging that they had informed him, as their real estate agent, all about the Stilwell contract, and that Little had failed to put the correct provisions in the Hardy sales contract and the general warranty deed. Little's defense was a general denial. The respective parties testified in accordance with their pleadings; and the Chancery Court found and decreed: 1. That Hardy was entitled to judgment against the Van Bibbers for $3,000 for breach of warranty; 2. that the Van Bibbers were entitled to no relief against Little; and 3. that the Van Bibbers were not entitled to foreclose their lien on the property for the balance of the $7,000 purchase note.

To reverse that decree, the Van Bibbers bring this appeal. We discuss the issues under the following topic headings.

I. *Breach of Warranty.* The possession by Stilwell of a portion of the premises described in the deed from the appellants to Hardy was a breach of the covenant of warranty. *Crawford* v. *McDonald,* 84 Ark. 415, 106 S. W. 206; *Kahn* v. *Cherry,* 131 Ark. 49, 198 S. W. 266; see, also, *O'Bar* v. *Hight,* 169 Ark. 1008, 277 S. W. 533 and *Arkansas Trust Co.* v. *Bates,* 187 Ark. 331, 59

S. W. 2d 1025. But under the general rules of estoppel, Hardy could not be heard to claim any damages arising from such breach until after September 1, 1946, because of the provisions in the sales contract, to which Hardy had agreed, and which stated: "The ground floor of this building is leased till September 1st, 1946."

However, the same paragraph in the sales contract continued in this language: ". . . (at) which time the purchaser can get possession."

The written provision in the sales contract, when considered with the general warranty deed, makes clear that, if the appellants granted Stilwell any lease rights effective after September 1, 1946, then such grant was not only a breach of the covenant of warranty in the deed, but was also actionable by Hardy, unless he be prevented from asserting his cause of action because of estoppel or waiver.

By way of defense, appellants claim that Stilwell's possession at the time of the delivery of the deed was notice to Hardy of the full extent of Stilwell's rights to the premises, even including the right of renewal of the lease; and appellants cite *Thalheimer* v. *Lockert,* 76 Ark. 25, 88 S. W. 591 and *Prince* v. *Alford,* 173 Ark. 633, 293 S. W. 36 to support their contention. To these cases may well be added *First National Bank* v. *Gray,* 168 Ark. 12, 268 S. W. 616, wherein we said: ". . . the possession of a tenant or lessee is not only notice of all of his rights and interests connected with or growing out of the tenancy itself or the lease, but is also notice of all interests acquired by collateral or subsequent agreements."

From these cited cases appellants argue that, since Hardy had constructive notice of all of Stilwell's rights, therefore Hardy is now barred from claiming a breach of warranty. But in this argument appellants are confusing Stilwell's rights under his possession with Hardy's rights under the covenant of warranty. Stilwell could claim that his possession was notice to Hardy of the lease extension rights; but that claim by Stilwell does not protect the appellants, because it is definitely stated in their contract (as previously quoted) with Hardy, that

on September 1, 1946, full possession of all of the premises would be delivered to him. In effect, the appellants—by their representation—lulled Hardy into a feeling of security that could well have caused him to forego any inquiry of Stilwell as to the duration of possession or right of extension. Such is the effect of Hardy's testimony.

Our holding in the recent case of *Thackston* v. *Farm Bureau Lumber Corp.*, 212 Ark. 47, 204 S. W. 2d 897 is apposite to the point now under discussion. In the reported case Rinehart had executed a timber deed to the Lumber Corporation which, with an extension, allowed until March, 1946, for the timber to be cut and removed. In September, 1945, Rinehart sold the land to Thackston, representing that all rights of the Lumber Corporation expired in December, 1945. We held that the Lumber Corporation's right to remove the timber continued until March, 1946, even against the rights of Thackston. But we also held that Rinehart was liable to Thackston on the warranty in the deed for all damages accruing after December, 1945, *because Thackston was not informed that the Lumber Corporation had any rights to cut and remove the timber after December, 1945.* Likewise, in the case at bar: Stilwell's right to an extension of his lease is superior to Hardy's claim; but Hardy can recover from appellants on the warranty for all damages accruing after September 1, 1946.

Appellants further contended—in their efforts to defeat Hardy's action on his warranty—that Hardy actually knew, before he received the deed, of Stilwell's right to extend the lease. We need not discuss the questions (a) whether one who contracts to purchase property with knowledge of a title defect thereby waives the right to a perfect title,[1] and (b) whether knowledge by a grantee of an outstanding easement or claim is an estoppel against an action for warranty,[2] because the evidence in the case at bar preponderates to the effect that Hardy did not actually know—until long subsequent

[1] See *Walker* v. *Towns*, 23 Ark. 147, and subsequent cases.

[2] See *Geren* v. *Caldarera*, 99 Ark. 260, 138 S. W. 335 and *Kahn* v. *Cherry*, 131 Ark. 49, 198 S. W. 266.

to the receipt of the deed by him—that Stilwell had any rights to possession after September 1, 1946.

Furthermore, Hardy's acceptance of the monthly rental money from Stilwell up to September 1, 1946, could not work an estoppel against Hardy, because the appellants in the contract of sale had assigned all such rent money to Hardy. Neither did Hardy's acts, in making his monthly payments to appellants after September 1, 1946, estop Hardy from maintaining an action of breach of warranty. The making of such payments by Hardy did not mislead the appellants in any way. They were benefited, rather than prejudiced, in receiving such payments. See *Schlumpf* v. *Shofner,* 210 Ark. 452, 196 S. W. 2d 747, wherein we said:

"The party invoking estoppel must ordinarily show that on account of the action or conduct of the party against whom it is asked he has been put in a more disadvantageous position than he would otherwise have occupied. Nothing in the testimony indicates that anything done by appellee caused appellants or their predecessor in title to assume a different position in the matter than either of them would otherwise have occupied."

So we hold that Hardy had an action for breach of the covenant of warranty, and that he cannot be defeated by either estoppel or waiver.

II. *Action as Premature.* Appellants urge that Hardy's action for alleged breach of warranty was prematurely filed, their contention being that a covenant of general warranty is broken only by eviction, and that Hardy was never evicted and his title did not completely fail. To support this contention, appellants cite, *inter alia,* these cases: *Gibbons* v. *Moore,* 98 Ark. 501, 136 S. W. 937; *Carpenter* v. *Carpenter,* 88 Ark. 169, 113 S. W. 1032; *Quinn* v. *Lee Wilson & Co.,* 137 Ark. 69, 207 S. W. 211.

It is true that a covenant of general warranty is broken by eviction (actual or constructive) by the outstanding superior title, just as these cited cases hold; but it is also true that a convenantee may settle an

adverse and superior title claim, *prior to actual eviction,* and then maintain action against the covenantor for breach of warranty, without having been actually evicted. In such a case, the covenantor may put in issue the question of whether the adverse title was superior. In the case at bar the right of Stilwell to an extension of his lease was superior to the right of Hardy to possession after September 1, 1946. This was discussed in topic I, *supra.* Stilwell's continued possession after September 1, 1946, constituted continued eviction of Hardy.

The facts and holdings in *Scoggin* v. *Hudgins,* 78 Ark. 531, 94 S. W. 684 support the above statements. Hudgins, in order to protect his possession, satisfied a judgment held against the deeded property by a superior adverse title; and then Hudgins—without being evicted—brought action to recover on his warranty. Mr. Justice BATTLE, speaking for this Court, said:

"Hudgins' cause of action accrued on the tenth day of December, 1900, when he paid the judgment recovered by Bowman, as receiver. He was not bound to wait until he was actually disseized. If he had done so, his right of redemption would have expired, and he would have lost the land, with the right to recover on the covenant of his grantor only a small part of its value. Why submit to such loss? Why wait for the inevitable? Equity does not require such sacrifice. *Collier* v. *Cowger,* 52 Ark. 322, 12 S. W. 702, 6 L. R. A. 107; *Dillahunty* v. *Railway Co.,* 59 Ark. 629, 634; 8 Am. & Eng. Enc. Law (2 Ed.), p. 203, and cases cited."

So we hold that Hardy's action for breach of the covenant of warranty was not prematurely filed.

III. *Damages.* No question was raised by the Van Bibbers as to the extension being otherwise than definite and for three years. Hardy paid Stilwell $3,000 in order to cancel Stilwell's right to further possession under the right of lease extension, and to obtain possession of the ground floor of the building on September 1, 1946. It was shown by a witness, unrelated to the parties, that the value of Stilwell's lease for the ad-

ditional 36 months after September 1, 1946, would have been $7,200, or $3,600 more than the contract rent; so the $3,000 paid by Hardy to Stilwell was not excessive. In *Collier* v. *Cowger,* 52 Ark. 322, 12 S. W. 702, 6 L. R. A. 107, we said: "Where the covenantee buys in the outstanding encumbrance to protect his estate, he is entitled to recover the sum expended in so doing, provided such sum does not exceed the amount paid to the warrantor for the property, with the legal interest on such sum from the date of extinguishment of such encumbrance. *Boyd* v. *Whitfield,* 19 Ark. 447; Rawle, Cov. Tit., sections 143-6." Other cases which state this right, and announce the measure of recovery, are: *Brawley* v. *Copelin,* 106 Ark. 256, 153 S. W. 101; *Scoggin* v. *Hudgins,* 78 Ark. 531, 94 S. W. 684, 115 Am. St. Rep. 60; *Dillahunty* v. *Railway,* 59 Ark. 629, 27 S. W. 1002, 28 S. W. 657; *Alexander* v. *Bridgford,* 59 Ark. 195, 27 S. W. 69; *Barnett* v. *Hughey,* 54 Ark. 195, 15 S. W. 464; *Mayo* v. *Maxwell,* 140 Ark. 84, 215 S. W. 678; and *Fox* v. *Pinson,* 182 Ark. 939, 34 S. W. 2d 549, 74 A. L. R. 583.

IV. *Appellants' Complaint Against Tom Little.* The gist of the appellants' complaint and evidence against Little was: that Little was a real estate broker; that as their agent he assured appellants that he would take care of all details and protect them in the sale to Hardy; that appellants explained to Little all about the rights of Stilwell to an extension of his lease; that Little negligently failed to place in the Hardy contract or deed anything about Stilwell's rights to extension of the lease; and that appellants should have judgment against Little for whatever amount the Court might award Hardy in his breach of warranty action.

Little testified that at no time prior to the delivery of the deed did he ever receive any information from the appellants, or anyone else, intimating that there was, or might be, any provision in the Stilwell lease by which the lease could be extended beyond September 1, 1946. In other words, Little denied categorically all that part of the appellants' testimony wherein they said they had explained to Little about Stilwell's rights to an extension of the lease. Little was supported

in his testimony by the witness, Eddie B. David, who had been an employee of Little in 1945, but, at the time of testifying in this case, was no longer connected with Little, and was in fact a competitor to him. David testified that he personally handled all of the transactions with the appellants, and that the appellants never at any time informed him or Little that Stilwell had any right to extend the lease beyond September 1, 1946. David was positive on this point, and we are convinced that his testimony supplies that preponderance of the evidence required to support the Chancery finding. In short, the appellants did not inform Little or David about the lease extension rights of Stilwell, so Little was guilty of no actionable negligence; and we affirm the decree of the Chancery Court in denying appellants a judgment against Little.

V. *Appellants' Right of Foreclosure.* At the inception of the litigation the appellants insisted that Hardy had practiced trickery on them in order to obtain the proper service of process; but they abandoned that claim when they filed their cross-complaint seeking to foreclose their mortgage (deed of trust) for the balance due thereon. The Chancery Court denied the appellants such right of foreclosure; and to that extent we hold that the decree of the Chancery Court was in error.

As a part of the purchase price for the property, Hardy executed a note to appellants for $7,000 payable at the rate of $100 per month. The note gave Hardy the right to pay off the entire balance at any time in advance of the due date, and also provided that failure to make any monthly payments promptly when due would mature the entire note at the option of the holder. In December, 1946, Hardy wrote appellants that, under the right given him, he declared the entire note to be due, and asked that it be sent to the bank at Blytheville for payment. When the note reached Blytheville Hardy filed his action for breach of warranty, and attached the note, since the appellants were nonresidents. Thus, Hardy elected to declare the entire amount due, and by this suit obtained a credit on the note for the amount adjudged to be his damages for breach of warranty. But certainly Hardy

owes the balance on the note; and the appellants are entitled to a foreclosure of their deed of trust for the balance due on Hardy's note, after crediting the judgment for breach of warranty.

It follows that the decree of the Chancery Court is affirmed on all points except as to appellants' right of foreclosure. On that single issue the decree is reversed, and the cause is remanded with directions to allow appellants a foreclosure unless the balance due them be promptly paid. The costs of this appeal are adjudged to be paid one-half by appellants and one-half by appellee Hardy.

TROTTER *v.* STATE.

4550 219 S. W. 2d 636

Opinion delivered April 18, 1949.

[redacted]

Claude F. Cooper, for appellant.

Ike Murry, Attorney General and *Arnold Adams,* Assistant Attorney General, for appellee.

ED. F. MCFADDIN, Justice. Upon an information, the sufficiency of which is not questioned, the appellant Lloyd "Doll" Trotter was tried, and convicted, of the crime of robbery. See § 3035, Pope's Digest, and § 41-3601 Ark. Stats., (1947). His motion for new trial contains 13 assignments, and we group and discuss these in suitable topic headings.

I. *Sufficiency of the Evidence.* Included herein are assignments 1, 2, 3, 11 and 12. Viewed in the light most favorable to the State, as we do when the defendant appeals from a judgment based on a jury verdict of guilty,* the evidence reflects that Trotter, Garner and Brewer (hereinafter called culprits) suspected that Mitchell (hereinafter called victim) had some money or other property on his person. The culprits persuaded the victim to leave a dance and go with them out into the darkness, and then they attacked him and took his wrist watch, cigarette lighter, glasses and billfold. Whether Trotter obtained any money from the billfold was not shown, but he did rifle it for anything of value. Mitchell's glasses were recovered from a truck in which Trotter was hiding; and the watch and cigarette lighter were recovered from Brewer.

While the culprits were attacking and robbing Mitchell the law enforcement officers came upon the scene, and Brewer and Trotter fled. Garner told the officers that he was trying to take Mitchell home as being intoxicated, but Mitchell informed them: "Like hell he's trying to take me home. They robbed me and took my money

* See *Slinkard* v. *State,* 193 Ark. 765, 103 S. W. 2d 50, and cases collected in West's Arkansas Digest, "Criminal Law," § 1159(2).

and watch and glasses, and now they are trying to kill me."

The officers then took Mitchell and Garner in charge, and drove to Mitchell's parked truck, where they found Trotter attempting to conceal himself. Mitchell's glasses were found in the truck.

In his defense, Trotter denied any act of robbery. He claimed that Mitchell had cursed and struck him, that a fight had ensued, and that he fled from the officers and went to Mitchell's truck to await his arrival, and to make him apologize for the cursing. The jury disbelieved the defense; and the evidence—only a brief portion of which we have summarized—is sufficient to show that the culprits successfully engaged in the enterprise of robbing the victim. See *Shell* v. *State,* 84 Ark. 344, 105 S. W. 575 and *Jenkins* v. *State,* 191 Ark. 507, 87 S. W. 2d 60.

II. *Corroboration.* In attacking the sufficiency of the evidence, appellant's learned counsel says: "There was no evidence against the defendant except the evidence of accomplices, and there certainly was no evidence aside from and independent of the evidence of the accomplices that would, in any manner, tend to connect the defendant with the crime of robbing Mitchell."

Garner and Brewer were also charged with the robbery of Mitchell. They confessed and accepted sentences. Trotter obtained a severance, and denied guilt. In the trial of Trotter (from which comes this appeal) the court instructed the jury that Brewer and Garner were accomplices; and the court also correctly announced to the jury the law as to the necessity and extent of corroborating evidence (see § 43-2116 Ark. Stats. 1947 and decisions there cited). The appellant did not object to such instruction, and offered no additional or supplementary instructions concerning either accomplices or corroboration. The witness Charles Adams testified that he heard the conversation between the three culprits and the victim, saw the culprits lure the victim away from the dance, and beat him; and also saw Trotter rifle Mitchell's billfold. In the trial court appellant did not claim that

Adams was an accomplice, did not ask the court to so declare, and did not request an instruction submitting that issue to the jury. Therefore, appellant waived the question of Adams being an accomplice. See *Morris* v. *State,* 197 Ark. 778, 126 S. W. 2d 93, and *Slinkard* v. *State,* 193 Ark. 765, 103 S. W. 2d 50. Adams has never been charged with the robbery, and his testimony, in sufficient essentials, corroborates that of the admitted accomplices.

III. *Alleged Hearsay Evidence.* Assignments 4 to 10, inclusive, in the motion for new trial present this topic. At the time of Trotter's trial Mitchell was in the United States Navy, and the prosecution was permitted to prove two statements made by Mitchell.

First Statement. As previously recited, Trotter fled on the approach of the officers. When Garner sought to allay suspicion by saying that he was taking Mitchell home as being intoxicated, Mitchell said: "Like hell he's trying to take me home. They robbed me and took my money and watch and glasses, and now they are trying to kill me."

Trotter claims that this statement by Mitchell was made in Trotter's absence, and was hearsay and inadmissible. We hold that the statement by Mitchell was a part of the *res gestae,* and admissible as such. The remark was immediately connected with the robbery, and possessed the spontaneity and other essentials of *res gestae.* In Underhill on Criminal Evidence, 4th Ed., § 611, p. 1189 this appears: "Anything the person robbed may have said during the assault which preceded or accompanied the robbery, if a part of the *res gestae,* is admissible." See, also, *Rogers* v. *State,* 88 Ark. 451, 115 S. W. 156, 41 L. R. A., N. S. 857, and 22 C. J. 461.

Second Statement. The police officers put Mitchell and Garner in the police car immediately after the foregoing statement, and Mitchell then said of Trotter: "He might be back down at my truck."

The officers drove immediately to Mitchell's truck, and found Trotter attempting to conceal himself in the truck. This second statement by Mitchell was hearsay,

but is admissible. The statement merely served to explain why the policemen went to Mitchell's truck. In *Reeves* v. *Jackson,* 207 Ark. 1089, 184 S. W. 2d 256, and, again, in *Amos* v. *State,* 209 Ark. 55, 189 S. W. 2d 611, hearsay evidence was admitted as explanatory of the actions of the witness in events leading up to the main transaction. In the case at bar, the policeman was testifying as to where he arrested Trotter; and the hearsay evidence was merely incidental to the arrest. In *Wylie* v. *State,* 140 Ark. 24, 215 S. W. 593 the arresting officer was allowed to detail some of the hearsay evidence explaining why he went to a certain place to arrest the defendants. In holding such hearsay evidence to be admissible, Mr. Justice HART said:

"Oftentimes it is impracticable to go directly into the main issue, and it is necessary to know the circumstances leading up to it. These circumstances, while not in themselves relevant, are treated as the introduction to the main matter or by way of inducement to it. Hence the preliminary question above quoted was entirely proper. Jones, Commentaries on Evidence, Vol. 1, § 137a."

Under authority of the foregoing cases, we deny appellant's assignments regarding the second statement.

IV. *Impeaching the Defendant's Credibility.* This is assignment 13 in the motion for new trial. Trotter testified as a witness in his own behalf; and on cross-examination the State—over defendant's objections—was permitted to interrogate him and obtain answers as to previous convictions and also specific acts of misconduct. The defendant admitted that he had served two sentences in the Boys' Industrial School, for burglary and grand larceny, and also admitted that he had made contradictory statements concerning his participation in one of these affairs. The trial court, in admitting the testimony, instructed the jury in this language: "It may be inquired into only as going to the credibility of this witness, and can be considered by the jury for no other purpose."

With the limitation contained in the court's ruling as quoted there was no error in allowing the State to

thus cross-examine the defendant for the purpose of impeaching his credibility. In *Benson* v. *State,* 103 Ark. 87, 145 S. W. 883, Mr. Justice FRAUENTHAL, speaking for this court, said:

"When a defendant in a criminal case becomes a witness in his own behalf, he is subject to impeachment like any other witness. The testimony which he gives may be discredited in the same manner that this may be done in the case of any other witness. Upon his cross-examination, therefore, he may be questioned relative to specific acts for the purpose of discrediting his testimony, and he may be asked as to whether or not he has suffered a former conviction for some crime affecting his credibility. When a defendant is a witness in his own behalf, the purpose of such testimony is only to impair his credibility and not to exclude him as a witness, and such conviction may be shown, therefore, by his own cross examination and need not be shown by the record of the judgment." See, also, *Zorub* v. *Mo. Pac. R. Co.,* 182 Ark. 232, 31 S. W. 2d 421 and *Bockman* v. *Rorex,* 212 Ark. 948, 208 S. W. 2d 991, and cases there cited.

Conclusion: We have examined all of the assignments contained in the motion for new trial, and find no error. Affirmed.

DUNDEE WOOLEN MILLS *v.* CHISM.

4-8820 219 S. W. 2d 628

Opinion delivered April 18, 1949.

Donham, Fulk & Mehaffy, for appellant.

Fred A. Isgrig and *Jno. S. Gatewood,* for appellee.

ROBINS, J. The only question presented is whether the evidence adduced before the Workmen's Compensation Commission was sufficient to justify the award of compensation made by the commission, affirmed by the circuit court on appeal, in favor of the widow and estate of Henry Chism, deceased.

On July 2, 1945, Henry Chism, a healthy negro man 50 years old, working for Dundee Woolen Mills at its store in Little Rock, while attempting to raise a window at the store, sustained an injury to his back. A short time thereafter, in an effort to lower a window at the store, he fell and again injured his back. He suffered considerable pain at the time and was taken home by an acquaintance. While the injury was not then regarded by him as serious, he immediately notified his employer. His injury continued to cause him pain, and, under the proof, he was unable to work regularly thereafter. An X-ray examination on December 20, 1945, revealed that there had been a collapse of the 10th thoracic vertebra. On March 15, 1946, an operation was performed to relieve pressure on his spinal cord, which had partially paralyzed him. The operation disclosed a malignant tumor at the location of the damaged vertebra. Other complications ensued and Chism died April 18, 1946.

There was much medical testimony adduced, that of the appellants being directed toward establishment of their contention that the cancer found was metastatic in nature, had its origin in some other part of Chism's body, and that the trauma suffered by him had nothing to do with the malignant condition disclosed by the operation. The testimony on behalf of appellee tended to establish that the injury suffered by Chism originated or aggravated the pathological condition of Chism's spine, in either of which situations liability for compensation arose. *Owen* v. *Dix,* 210 Ark. 562, 196 S. W. 2d 913. It was also shown that at the time he received the injury Chism was an able-bodied man, but that after the injury

until his death he suffered more or less pain and disability.

We deem it unnecessary to rehearse and discuss the evidence in detail. It is sufficient to say that there was testimony, of a substantial nature, to authorize the finding of the commission, and of the circuit court, that Chism died from an accidental injury received in the course of his employment. Since this is so, we may not disturb the finding or the judgment. *J. L. Williams & Sons, Inc.* v. *Smith,* 205 Ark. 604, 170 S. W. 2d 82; *Kloss* v. *Ford, Bacon & Davis, Inc.,* 207 Ark. 115, 179 S. W. 2d 172; *Simmons National Bank* v. *Brown,* 210 Ark. 311, 195 S. W. 2d 539.

Affirmed.

MILLS *v.* LATHAM.

4-8757 219 S. W. 2d 609

Opinion delivered April 18, 1949.

W. F. Reeves, J. Loyd Shouse and *J. F. Koone,* for appellant.

Opie Rogers, for appellee.

GRIFFIN SMITH, Chief Justice. John W. Heller, a resident of Searcy County, died June 23, 1947. A writing dated September 9, 1946, with a modification dated June 21, 1947, was offered for probate at Marshall June 30, 1947. By order of "N. J. Henley, Referee in Probate," it was found that the document was Heller's last will and testament, that the addition or modification was a properly executed codicil, and that "all necessary parties at

interest are duly before the Court." A direction was that the will be admitted to probate, and that letters testamentary be issued to Wm. T. Mills, who would serve without bond.

Mills, in a Chancery action, brought to that Court's attention certain alleged contradictions or inconsistencies, and concluded with a prayer that the will be construed, and that the Court "specifically determine who are the beneficiaries" and the amount of property to which each would be entitled. Methodist Orphans Home Association of St. Louis, by answer and a pleading in the nature of an intervention, asked the Court to declare it was the testator's intention that the Association should receive "all money in the estate."

From a decree construing the alleged will, Mills has appealed.

There is an affirmative record-showing that admission of the will to probate was on order of a Referee, and there is no contention that the *Court,* functioning as such, has acted. In principle, the transaction is not distinguishable from *Jansen* v. *Blissenbach,* 214 Ark. 755, 217 S. W. 2d 849.

Recognizing, however, that evidence of Court approval may have been inadvertently omitted from the transcript, the cause is remanded, although the judgment must be reversed.

It is appropriate to mention that Amendment No. 24 to §§ 19, 34, and 35 of Art. 7 of the Constitution did not, *ipso facto,* consolidate Chancery and Probate Courts, hence original jurisdiction of Probate was not affected. *Lewis* v. *Smith,* 198 Ark. 244, 129 S. W. 2d 229; *Wooten* v. *Pennel,* 200 Ark. 353, 140 S. W. 2d 108; *Gray* v. *Fulton,* 205 Ark. 675, 170 S. W. 2d 384. Probate jurisdiction was discussed by Mr. Justice BUTLER in *Huff* v. *Hot Springs Savings, Trust, and Guaranty Co.,* 185 Ark. 20, 45 S. W. 2d 508, and in *Jesseph* v. *Leveridge,* 205 Ark. 665, 170 S. W. 2d 71. We do not in this proceeding draw the jurisdictional line.

Reversed.

PANICH, EXECUTOR *v.* BUSINESS MEN'S ASSURANCE COMPANY OF AMERICA.

4-8823 219 S. W. 2d 610

Opinion delivered April 18, 1949.

[redacted]

Frank H. Cox, for appellant.

Charles W. Mehaffy, Pat Mehaffy and *William H. Donham,* for appellee.

GEORGE ROSE SMITH, J. The question presented by this appeal is whether a $1,000 policy of accident insurance issued by the appellee to Brunck Lewis was in force when the insured was killed accidentally on April 4, 1947. The policy was issued on May 16, 1946, for an original term ending July 1 of that year. A monthly renewal premium was paid by the insured on July 31, and a similar payment was made on the last or next to the last day of each succeeding month until the final payment on February 28, 1947.

This is the pertinent language in the policy; "Upon the expiration of the original term, or any subsequent term for which this policy may have been renewed, the insured may, with the consent of the Company, renew the policy . . . for a term of one month by the payment of one-third of the quarterly premium. A grace period ending . . . on the thirty-first day after any renewal premium falls due, during which period this

insurance shall be in full force and effect, will be allowed in the payment of all renewal premiums. If any renewal premium has not been received by that time . . . the policy shall expire. . . ." There is also a provision for reinstatement in the event of lapse.

Appellant contends that there was no grace period at the end of the original term. If this were true the policy lapsed on July 1 and was reinstated upon July 31. Upon that theory all monthly premiums were paid in advance, so that death occurred during the period of grace for payment of the April premium. But even when the policy is construed most strongly against the appellee, this meaning cannot be wrung from its language. The contract states plainly that it may be renewed upon the expiration of the original term and that a grace period is allowed after any renewal premium falls due. Hence all monthly payments were made in time to prevent lapse, and the policy continued in force until thirty-one days after March 1, the due date of the premium that was not actually paid. As death occurred after the policy had lapsed, the appellant is not entitled to recover.

In the alternative appellant contends that the appellee, by accepting payments on the last day of each month, changed the premium date from the first to the last day of each month. Upon this premise the March premium was not due until March 31; so death occurred within the period of grace. But since the insured had the privilege of making payment on the last day of each month if he liked, the appellee's acceptance of each premium was simply a compliance with its contract and did not operate to change the due date.

Affirmed.

MOUSER *v.* STATE.

4551 219 S. W. 2d 611

Opinion delivered April 18, 1949.

Claude F. Cooper, for appellant.

Ike Murry, Attorney General and *Jeff Duty,* Assistant Attorney General, for appellee.

MINOR W. MILLWEE, Justice. R. E. Elliott, a night patrolman of the City of Blytheville, was making his rounds on Sixteenth Street about 11:30 p. m. September 28, 1948. As he walked around the rear of the Builder's

Supply Company he saw a man standing before a window of the building who turned and started running as the officer approached. Elliott called to the man and fired two shots at him as he fled through some high weeds back of the building. The officer then went to the window and found it open. The bottom of the window had skinned places indicating that it had been pried open and the latch pushed up by some kind of an instrument.

About two weeks later the sheriff of Mississippi County received information from Missouri officers that a man named Jess Fithen who was under arrest in that state had made statements implicating himself and appellant, Homer Mouser, in the alleged burglary at Blytheville. Appellant had also made a statement to the Missouri officers and was charged in the Blytheville Municipal Court with burglary. The sheriff of Mississippi county and chief of police of Blytheville went to Jackson, Missouri, where appellant was being held. They talked with appellant about twenty or thirty minutes in the courthouse at Jackson.

According to the testimony of the sheriff, appellant freely and voluntarily told of the attempt of Fithen and appellant to enter the building on the night in question and fleeing on the approach of officer Elliott. He also stated that a punch, sledge hammer and bar were dropped in the weeds about 30 feet from the building as he and Fithen fled. A punch and sledge hammer were found by city officers at the place designated by appellant, after receipt of the information from Missouri officers, but before the conversation with appellant.

Appellant also stated that he and Fithen drove to Blytheville and Keiser on the day of the alleged burglary and "cased" the bank at Keiser and the Builder's Supply Company, and that after they fled from the building, they drove to Missouri where they rejoined appellant's wife.

On October 26, 1948, information was filed in circuit court which, omitting formal parts, charged: "The said defendant on the 28th day of September, 1948, in the Chickasawba District of Mississippi County, Arkansas,

did unlawfully, burglariously and feloniously and with force break and enter the Builder's Supply Company, located in the City of Blytheville, Arkansas, with the unlawful and felonious intent to commit Grand Larceny, against the peace and dignity of the State of Arkansas." Upon trial the jury found appellant guilty and fixed his punishment at two years in the penitentiary and he has appealed from the judgment based on the jury's verdict.

It is first insisted that error was committed in permitting the deputy prosecuting attorney in his opening statement to detail the alleged confession made by appellant. In overruling appellant's objection the court cautioned the jury that the confession would not be admitted, if found to be incompetent when offered by the State. Appellant argues that the confession was subsequently improperly admitted in evidence and that error was, therefore, committed in detailing it to the jury.

When appellant objected to the admission of the confession, the trial court followed the usual practice of hearing testimony in the absence of the jury as to the circumstances under which the alleged confession was given. At the hearing in chambers, the testimony of the officers tended to show that the confession was voluntarily made while the testimony of appellant indicated that it was made on a promise of leniency and a threat to involve his wife. Appellant did not testify before the jury. Whether the confession was freely and voluntarily made thus became a question for the jury which was submitted under correct instructions. *Charles* v. *State,* 198 Ark. 1154, 133 S. W. 2d 26. Since the alleged confession was properly admitted in evidence, the court did not err in permitting the prosecuting attorney to detail it to the jury in the opening statement. *Smith* v. *State,* 205 Ark. 1075, 172 S. W. 2d 248.

Appellant also contends that the alleged confession was inadmissible and the testimony, therefore, insufficient to sustain a conviction because there was no proof of *corpus delicti* under Ark. Stats. (1947), § 43-2115, which provides: "A confession of a defendant, unless made in open court, will not warrant a conviction, unless accompanied with other proof that such an offense was

committed." We have frequently held that the extrajudicial confession of the defendant, accompanied with proof that the offense was actually committed by someone, will warrant his conviction. *Smith* v. *State,* 168 Ark. 253, 269 S. W. 995; *Haraway* v. *State,* 203 Ark. 912, 159 S. W. 2d 733.

In *Harshaw* v. *State,* 94 Ark. 343, 127 S. W. 745, the court said: "It is not essential that the *corpus delicti* be established by evidence entirely independent of the confession, before the confession can be admitted and given probative force. The confession may be considered in connection with other evidence tending to establish the guilt of the defendant. But, if there is no other evidence of the *corpus delicti* than the confession of the accused, then he shall not be convicted alone upon his confession. *Hubbard* v. *State,* 77 Ark. 126, 127 S. W. 745; *Meisenheimer* v. *State,* 73 Ark. 407, 84 S. W. 494." See, also, *Russell* v. *State,* 112 Ark. 282, 166 S. W. 540.

When the testimony of officer Elliott is considered in connection with the finding of the burglary tools at the place designated by appellant, it was sufficient to show a breaking of the building by someone with the intent to commit a felony. We have held that, if one either breaks or enters the building of another in the night time with the intent to commit a felony, he is guilty of burglary under Ark. Stats. (1947), § 41-1004. *Minter* v. *State,* 71 Ark. 178, 71 S. W. 944; *Ingle and Michael* v. *State,* 211 Ark. 39, 198 S. W. 2d 996.

We have also held that if a house is entered in the night time with the intent to commit a felony, it is immaterial that the guilty purpose was not actually consummated because there was insufficient property in the house to steal or the accused was frightened off before he carried out his intent. *Ragland* v. *State,* 71 Ark. 65, 70 S. W. 1039. The same rule is applied where the defendant is surprised and interrupted after the breaking but before entry. *Creek* v. *State,* 214 Ark. 429, 216 S. W. 2d 787.

A serious question in the case is found in appellant's contention that the evidence was insufficient to

sustain the charge laid in the information. The question was raised by motion at the conclusion of the testimony and by specific objections to Instruction No. 1 given by the court. This instruction was given in the language of § 41-1004, *supra,* which provides: "If any person shall in the night time, wilfully and maliciously, and with force, break or enter any house, tenement, boat or other vessel, or building, although not specially named herein, with the intent to commit any felony whatever, he shall be deemed guilty of burglary." The State insists that the information charged burglary under this section while appellant contends that he was charged with violation of Ark. Stats. (1947), § 41-1001, which reads: "Burglary is the unlawful entering a house, tenement, railway car, automobile, airplane, or other building, boat, vessel, or water craft with the intent to commit a felony or larceny."

It will be noted that the information charged both breaking and entering, so that an offense was sufficiently charged under § 41-1001, *supra,* but the proof failed to show an entry of the building. While the information alleged a breaking it did not charge that it was done in the night time, which is an essential ingredient of an offense under § 41-1004, *supra.* Of course, the prosecuting attorney had the right, with the court's permission, to amend the information during the trial under Ark. Stats. (1947), § 43-1024. Ingle and Michael v. State, *supra.* Here appellant objected to the testimony showing that the offense was committed at night. He also challenged the sufficiency of the information by motion at the conclusion of the evidence and by specific objection to the instructions, without any offer by the State to amend the information. The overruling of such objections constituted reversible error and sustains appellant's contention that he was convicted for an offense not charged in the information after timely objections had been made. This amounted to more than a mere informality or uncertainty which a defendant may waive by failing to object before pleading to the merits or going to trial. See, *Cole* v. *State of Arkansas,* 333 U. S.

196, 68 Sup. Ct. 514, 92 Law Ed. 644; 12 C. J. S., Burglary, § 34.

We find it unnecessary to consider the assignment of error relating to improper argument of the deputy prosecuting attorney, as this should not occur on retrial. We have examined the other assignments of error in the motion for new trial and find them to be without merit.

For the error indicated, the judgment is reversed and the cause remanded for a new trial.

HUFF *v.* ARKANSAS TRUST COMPANY, EXECUTOR

4-8846 219 S. W. 2d 614

Opinion delivered April 18, 1949.

Earl J. Lane, for appellant.

A. F. House, for appellee.

GRIFFIN SMITH, Chief Justice. By direct appeal C. Floyd Huff challenges as insufficient an allowance of $5,000 as attorney's fee, while executors and others insist in their cross-appeal that $3,500 is enough.[1]

The Court's understanding of the record, familiarity of the Judge with successive transactions and activities, his knowledge respecting the capable men who in evaluating services testified for each side,—these considerations and a review of the abstract persuade us that in exercising the discretion with which the trial Court was

[1] The decree directing payment of the fee is against Arkansas Trust Company and Q. Byrum Hurst, as co-executors of the estate of D. C. Richards, and Cooper B. Land, as Administrator [of the Richards estate] with the will annexed.

invested, no abuse has been shown; nor was the judgment contrary to a preponderance of the evidence. *Jacoway* v. *Hall,* 67 Ark. 340, 55 S. W. 12; *Phoenix Insurance Co.* v. *Fleenor,* 104 Ark. 119, 148 S. W. 650.

Affirmed.

Mr. Justice HOLT concurs.

Mr. Justice GEORGE ROSE SMITH not participating.

HOLT, J., concurring. The record in this case is voluminous. Many witnesses testified for the parties and their evidence was conflicting. A fact question alone was presented.

The record before us was made in the Probate Court and on appeal here from the judgment, we try the cause *de novo* just as on Chancery appeals, and under our long established rules we must affirm unless we should determine that the lower court's findings and judgment are against the preponderance of all the evidence.

As I read the record, no issue was presented on whether the trial court abused its discretion in arriving at the judgment rendered. It is not for us to determine whether the court abused its discretion, that not being an issue. What we should and do determine is, solely in this case, where does the preponderance of the testimony lie.

The majority opinion appears to me to be contradictory by basing its decision on either the court's discretion or on the preponderance of the evidence rule. I think our holding should be that the findings of the court are not against the preponderance of the evidence and for this reason alone, the judgment should be affirmed.

SCHUMAN *v.* REYNOLDS.

4-8825 219 S. W. 2d 929

Opinion delivered April 18, 1949.

Rehearing denied May 23, 1949.

Wm. J. Kirby, for appellant.

Gaughan, McClellan & Gaughan, for appellee.

GRIFFIN SMITH, Chief Justice. Mary Ruth Reynolds and others were record owners of eighty acres sold by the Collector for delinquent State and County taxes in November 1941. The property was purchased by Manie Schuman, to whom a Clerk's deed was issued September 25, 1945. In a suit filed in June 1947 the record owners alleged errors in the assessment and sale, the nature of which, it was insisted, avoided the sale. From a decree in favor of the plaintiffs, sustaining their contentions in three respects, Schuman has appealed.

The trial Court found (a) that in the absence of record entries affirmatively showing a valuation fixed by the assessor, when considered in connection with the Clerk's testimony, there was a reasonable inference that the Assessor failed to value the land; (b) that a mathematical error caused an overcharge of ten cents for which the property sold, and (c) one of the oaths the Assessor was required to make,[1] was omitted, and another was defective.[2]

Since the overcharge has been established, and it alone is controlling, there is no occasion to discuss other assignments.

Book C (1940) was identified by the Clerk as the official record of Lands Sold to Individuals. Three

[1] Pope's Digest, § 13623.

[2] Pope's Digest, § 13676.

items ($7.16, 72c, and 55c) were extended as $8.53. The Clerk testified that if the owners [during the two-year grace period allowed by law] had sought to redeem, ". . . they would have been required to pay ten cents more than was due."

Appellant replies that in the certificate he received the extension was correctly shown to be $8.43. This, he thinks, was sufficient to create a conclusive presumption that the land was "struck off" for the correct amount, and that the alleged overcharge should be attributed to faulty addition entering into transactions after the sale —an error the Clerk would have discovered had the owners sought to redeem.

But this conclusion is not in harmony with the Clerk's testimony that the owners would have been *required* to redeem as though the sale had been made for $8.53.[3]

In principle the case is not distinguishable from *Lumsden* v. *Erstine,* 205 Ark. 1004, 172 S. W. 2d 409, 147 A. L. R. 1132.

Affirmed.

YOUNGBLOOD *v.* KUHN.

4-8830 219 S. W. 2d 615

Opinion delivered April 18, 1949.

[3] The testimony referred to was: Question: "Then there is an error in taxes, penalty and cost of ten cents?" A. "Yes." Q. "And one redeeming it would have been required to pay ten cents more than was due"? A. "Yes."

Guy B. Reeves and *Henry E. Spitzberg,* for appellant.

H. A. Tucker and *Neva B. Talley,* for appellee.

HOLT, J. This is a suit by appellee, Eva John Kuhn, agent of appellant, Harold B. Youngblood, for an accounting of certain commissions on sales of real estate, and specifically, the sale of the DeSoto Hotel in Hot Springs. Appellant Youngblood, denied every material allegation in appellee's complaint. From a decree awarding appellee $2,028, is this appeal.

For reversal, appellant, Youngblood, says: "1. The decree is clearly against the preponderance of the evidence. 2. Appellee performed no compensable service according to the terms of her contract, in that she did not 'furnish' a buyer; hence she has no valid claim. 3. The contract of February 20, 1946, signed by appellee and appellant as manager for U. S. Realty Sales, Inc., a Mississippi corporation, was an integrated contract between appellee and the corporation, as a disclosed principal, and only the corporation could be held accountable to appellee, if, indeed, she has a valid claim."

These contentions are so interrelated that we shall consider them together.

The evidence shows that appellant, Youngblood, under a contract between him and the U. S. Realty Sales Corporation of Mississippi, paid that company $1,000 for the franchise, or, exclusive right, to operate a real estate business in Arkansas under the name of U. S.

Realty Sales, Inc., of Little Rock, Ark. In addition, he agreed to pay the Mississippi corporation a certain percent of commissions on all Arkansas sales. This Mississippi corporation was not licensed in Arkansas, and the U. S. Realty Sales, Inc., was not, in fact, a corporation.

Youngblood, under his contract with the Mississippi corporation, opened his office in Little Rock, and on February 20, 1946, employed appellee, Mrs. Kuhn, as his agent, under the following contract: "U. S. Realty Sales, Inc., 314 Exchange Building, Little Rock, Arkansas. Corporation and Agents' Agreement. This agreement entered into on this 20th day of February, 1946, by and between the U. S. Realty Sales, Inc., Little Rock, Arkansas, a Mississippi Corporation, Home Office, Jackson, Mississippi, to be hereinafter known as the Corporation, and Eva John Kuhn, to be hereinafter known as the Agent. Whereas, the Agent desires exclusive rights to use the said copyrighted sales system in the district of Hot Springs, State of Arkansas. The Corporation does grant and assign with all of the privileges thereto pertaining unto Eva John Kuhn, the exclusive right as agent in the territory above set forth as an affiliate of the Corporation on the following terms and conditions to-wit:

"The Corporation Agrees: To furnish the agent with listings from the Main Office of properties listed with all state offices in the Corporation, by other Managers, and from other sources, and to aid, assist and cooperate to the fullest extent with the said Agent in closing of all sales.

"To pay to the said Agent 30% of all commissions on all transactions in the district above set forth after the Home Office commission had been deducted, and when the buyer is furnished by the agent; and 50% of all commissions when the buyer is sold by the agent; and will pay 10% of the commission to the agent for all listings sold by the Corporation after commission of the Corporation has been deducted; and to furnish the said Agent all equipment, such as Listing Blanks, Option

Forms, Advertising Layouts, etc. The Corporation agrees to pay for advertising in the above named district, to promote listings on prospects to be used by the above named Agent and Corporation.

"The Agent Agrees: To operate the said business as the U. S. Realty Sales of Arkansas, to furnish the Corporation with all listings, all salable property that is priced right and worthwhile in his district; to furnish the Corporation with the name and address of all prospective purchasers of property to be found in his district, regardless of whether these parties want to buy in his district or any where else in the United States; if necessary to furnish bond at the expense of the Corporation; not to operate in any way or to be interested in any way in real estate business other than the business of the U. S. Realty Sales, Inc. The Agent agrees that if he or she desires of his own accord to cancel this agreement he will give the Corporation at least fifteen days' notice. It is mutually agreed and understood that the above named Agent must operate as an Agent of the U. S. Realty Sales, Inc.

"That when listings, sales agreements and contracts are furnished by other parties through the Corporation or the Agent that they shall receive an agreed commission and that all net commissions, earnings, and receipts shall be divided as above set forth. (This includes listings from Realtors, Bankers, Brokers, Lawyers, etc., who usually receive 50% commission); that this instrument contains the complete agreement of the parties hereto and that if any part of this agreement is contrary to the laws of any state the same is null and void, but that it shall not invalidate any other part of this agreement; and that this agreement is not negotiable or transferable by the Agent, except on written consent, first secured from the Corporation.

"In witness whereof, the parties hereto have set their hands on the day and the year first above written. U. S. Realty Sales, Inc. By /s/ H. B. Youngblood, Manager. Witness to signature of the Manager: /s/ Helen Hays. /s/ Eva John Kuhn, Agent."

Appellee, thereafter, opened her office in Hot Springs, made a number of sales, under her contract, and received most of the commissions due her except the one in controversy here. She had authority from the owner to sell the DeSoto Hotel for $350,000. About March 18, 1946, J. G. Asimos of Peoria, Ill., came to her office, and quoting from appellant's brief: "The real estate agent who first contacted me in regard to the sale of the DeSoto Hotel was Harold Youngblood's office in Hot Springs. Mrs. Kuhn, Mrs. Eva Kuhn, I believe, was in that office. The next day, I believe, about a day or two after Mrs. Kuhn first contacted me I met Mr. Youngblood. I went to the Arkansas Trust Company to see Mr. Sexton, along with Mrs. Kuhn. The discussion about the hotel first took place with Mrs. Kuhn at the Youngblood office in the Sigler Building.

"Mrs. Kuhn did not talk with us about the DeSoto Hotel; she made an appointment for Mr. Youngblood to show us the hotel. I would say I finally closed the deal about three months later (paying $375,000 for the property). As a matter of fact I had gone to Mr. Youngblood's office here relative to considering the purchase of property either in Oklahoma or Mississippi. . . . Q. Did Mrs. Kuhn have anything to do with the details with reference to the consummation of the sale of this hotel? A. Nothing except the information."

Mrs. Kuhn testified that she took Asimos to her banker, Mr. Sexton, and arranged for holding money in escrow until the purchase was completed. She offered to show him the hotel, but he told her he had already been through it, having previously stayed there as a guest.

We do not detail the testimony, but after reviewing it all, we think the preponderance thereof shows that appellee was the first to contact Asimos, found the purchaser, as agent for Youngblood, and was the procuring cause of the sale which was consummated by Youngblood.

It was held in *Long* v. *Risley,* 188 S. W. 2d 132, (208 Ark. 608): "(Headnote 4) Substantial evidence justified judgment granting broker commission on sale of defend-

ants' farm listed with him on ground that broker was procuring cause, notwithstanding sale was made by defendant. (Headnote 1) A real estate agent, bringing about or procuring sale of property, placed in his hands for sale, . . . or through introduction of purchaser or disclosure of his name to owner, is entitled to commission on sale price though sale is made by owner." See, also, *Murphy* v. *Bradley,* 200 Ark. 208, 138 S. W. 2d 791, 128 A. L. R. 427.

Mrs. Kuhn's contract was solely with Youngblood. He was her manager, and she his agent. In no sense was she a rival agent of Youngblood. She had no contract with the Mississippi corporation. The contract itself not only so shows but Youngblood admitted as much in his testimony, from which we quote: "Q. (Mr. Tucker) Did you ever read this contract before you signed it? A. (Youngblood) I created it. . . . Q. Mr. Youngblood, that contract there, the form is the same form of contract you had with the U. S. Realty Sales over in Mississippi, isn't it? A. Not exactly. Q. Well, did you change the terms of it some? A. Yes, I created that contract myself. . . . By the Court: Q. Mr. Youngblood, this contract which has been introduced, one of the contracting parties is referred to as U. S. Realty Sales, Incorporated, of Little Rock, Ark., a Mississippi corporation, home office, Jackson, Mississippi, to be hereafter known as the corporation. Is the U. S. Realty Sales, Incorporated, of Little Rock, Arkansas, an Arkansas corporation? A. (Youngblood) It is not, your Honor. Q. Did you have any Arkansas corporation at all? A. I did not, Sir. Q. You operated under just a trade name of U. S. Realty Sales of Arkansas? A. That is right; that was a trade name through the corporation in Mississippi."

The trial court found, as reflected in the decree: "And the court being well and sufficiently advised as to all matter of fact and law arising herein doth find: that there existed a contract between plaintiff and defendant Harold Youngblood for division of commissions on sale of real estate; that the plaintiff should recover judgment for her commission on the sale of the DeSoto Hotel;

that the total commission paid by the owners of the DeSoto Hotel according to their interpleader filed in this court in case No. 77745 was $8,450; that the U. S. Realty Sales Corporation of Mississippi, or the 'home office' commission out of this amount as alleged in their answer and as adjudicated in said case was $1,690, or 20% of the total amount; that the remaining Youngblood and Kuhn commission on the DeSoto Hotel sale was $6,760; and that the plaintiff, Eva John Kuhn, is entitled to 30% of that amount under the terms of her contract, or the sum of $2,028; and that the testimony was insufficient to establish that she is entitled to commission on any other property mentioned.''

After a careful review of the record, we are unable to say that the findings of the Chancellor were against the preponderance of the evidence and accordingly, the decree must be, and is affirmed.

MARTIN *v.* BOND, TRUSTEE.

4-8836 219 S. W. 2d 618

Opinion delivered April 18, 1949.

Fletcher Long, for appellant.

E. J. Butler, for appellee.

MINOR W. MILLWEE, Justice. The J. H. Blount estate owns a 200-acre farm near Madison in St. Francis county. The St. Francis River runs on the north and east sides of the Blount lands. Appellant, Dwight R. Martin owns a farm adjoining the Blount lands on the west.

Appellee, Theo Bond, as trustee of the J. H. Blount estate, brought this suit to restrain appellant and his tenants from closing a road which extends across appellant's land from the Blount farm on the east to a county road leading north to Madison on the west. Appellee alleged that the road furnished the only reasonable and convenient way to and from the Blount lands; that it had been in use by the owners and tenants of the Blount property and the public generally for over 50 years; that appellee and the public generally would be without access to lands lying east of appellant's lands if said road is closed. It was further alleged that appellee would suffer irreparable injury by closing the road and that he was without adequate remedy at law.

Appellant filed a motion to dissolve a temporary restraining order issued by the court in which pleading he denied the allegations of the complaint. After two hearings the trial court found that the road in controversy had become a public way by prescription, and the temporary restraining order was made permanent. This appeal challenges the correctness of the decree based on the chancellor's finding.

The road in question was established by appellee's father in 1892 and originally followed a meandering route along Crow Creek across the lands now owned by appellant. About 1923 or 1924 the route of a portion of the road was changed to run as it does today because of washouts along the banks of the creek. An insurance company acquired the Martin lands by foreclosure sometime prior to 1924 and sold to Ples Purcell in December, 1936. The warranty deed to Purcell contained a general exception as to roads across the lands conveyed. Appellant purchased the land from Purcell in 1943.

The lands of both parties have been occupied and in cultivation for more than 50 years. Eight or nine tenant families have resided on the Blount lands and have produced more than 100 bales of cotton per year for a number of years. The proof shows that these families and the public generally used the road as it originally ran without interruption until 1923 or 1924, when the route was changed. This use was continued over the changed route until 1938 or 1939. There is considerable dispute in the testimony as to whether the road was thereafter used by appellee's tenants and the public under claim of right or by permission of Purcell and appellant.

Some of Blount's tenants were warned by Purcell to stop using the road, but most of them continued to do so despite the warnings, after consulting their landlord. There was apparently no effort on the part of either Purcell or appellant to stop use of the road by the general public. The county judge testified that he warned Purcell not to close the road. While there was no order of the county court making the road a public way, it was shown that the county worked the road at times prior to 1924 and that tenants on the Blount estate worked and assisted in maintaining the road from 1924 to 1939, and at times since. There are 25 or 30 school children living on the Blount lands who would have to walk two and one-half miles farther to school if denied a way across appellant's land. Photographs introduced by appellee show the road to be well traveled and tend to refute the testimony of some of appellant's witnesses

that it was merely a turnrow. The greater weight of the evidence also shows that an alternate route over the lands of another adjacent owner was about two and one-half miles longer than the route in controversy. The alternate route was also narrow, impassable during winter months, and used only by permission of the owner of the lands through which it ran.

The principal contention of appellant for reversal of the decree is that, since the road in controversy is across uninclosed lands, a presumption arises that the use by appellee and the public generally was permissive and that this presumption has not been overcome by an affirmative showing of adverse use for more than seven years. In most of the cases relied on by appellant the route sought to be established as a public way by prescription was across lands which were not only uninclosed but also wild, unimproved and unoccupied. Some of these are *Merritt Mercantile Co.* v. *Nelms,* 168 Ark. 46, 269 S. W. 563; *Caddo River Lbr. Co.* v. *Rankin,* 174 Ark. 428, 295 S. W. 52; and *Bridwell* v. *A. P. & L. Co.,* 191 Ark. 227, 85 S. W. 2d 712.

In *Brumley* v. *State,* 83 Ark. 236, 103 S. W. 615, also relied on by appellant, the court in describing a part of the way involved, said: "They were dirt roads leading through unfenced and wild lands, and the mere fact that the public may use such roads leading through the open forest for seven years or over does not as a rule make them public roads. When the public use a road running through open and unfenced lands without any order of the county court making it a public road and without any attempt to work it or exercise authority over it as a public highway, the presumption is that the use of the road is not adverse to the rights of the owner of the land, but by his consent. When he needs the land, he may withdraw his consent, fence the land and exclude the public without violating the law."

Appellant also cites *Boullioun* v. *Constantine,* 186 Ark. 625, 54 S. W. 2d 986. That case involved the question whether a private way was acquired by prescription over uninclosed and vacant lands in the City of Little Rock. Particular reliance is placed on the following

language of the court: "While not universally recognized, the prevailing rule seems to be that, where the claimant has openly made continuous use of the way over *occupied* lands unmolested by the owner for a time sufficient to acquire title by adverse possession, the use will be presumed to be under a claim of right; but where the easement enjoyed is across property that is *uninclosed,* it will be deemed to be by permission of the owner, and not to be adverse to his title." (Italics supplied). The difficulty that arises in attempting to apply this rule in the instant case is that the land in controversy is both occupied and uninclosed. Language subsequently used in the opinion would seem to indicate that use of the word "uninclosed" had reference to lands that were also open, or unoccupied. The court further said in that case: "Cases might, and do, arise where those using a private way over uninclosed lands may, by their conduct, openly and notoriously pursued, apprise the owner that they are claiming the way as of right and thus make their possession adverse . . ."

In *Holt* v. *Crawford County,* 169 Ark. 1069, 277 S. W. 520, the court said: "Appellant contends for a reversal of the judgment offsetting his damages with benefits because the public had no prescriptive rights, under the law, in the old road. In support of this contention, he cites the case of *Brumley* v. *State,* 83 Ark. 236, 103 S. W. 615, in which the rule was announced that where the road was used by the public without an order of court through wild, unused land, the presumption is that it was used by permission or consent of the owner of the lands. In the instant case, even if such a presumption existed, it was not conclusive, and might be overcome by facts and circumstances adduced in evidence . . ."

In *Howard* v. *State,* 47 Ark. 431, 2 S. W. 331, it was held: "A road becomes established as a public highway by prescription, where the public, with the knowledge of the owner of the soil, has claimed and continuously exercised the right of using it for a public highway for the period of seven years, unless it was so used by leave, favor or mistake; and this though the public travel may have somewhere slightly deviated from the original track

by reason of any obstacle that may have been placed in it." Later cases have consistently followed this rule. See, *Patton* v. *State,* 50 Ark. 53, 6 S. W. 227; *McCracken* v. *State,* 146 Ark. 300, 227 S. W. 8, 228 S. W. 739; *Harrison* v. *Harvey,* 202 Ark. 486, 150 S. W. 2d 758; *Pierce* v. *Jones,* 207 Ark. 139, 179 S. W. 2d 454.

In *McClain* v. *Keel,* 135 Ark. 496, 205 S. W. 894, the court said: "It is well settled that where a highway is used by the public for a period of more than seven years, openly, continuously and adversely, the public acquires an easement by prescription or limitation of which it can not be dispossessed by the owner of the fee. *Patton* v. *State,* 50 Ark. 53, 6 S. W. 227; *District No. 2* v. *Winkler,* 102 Ark. 553, 145 S. W. 209. But it is also equally well settled that the right to a public highway once established by limitation or prescription may be abandoned by non-user, and if so abandoned for a period of more than seven years, the right of the owner of the fee to re-enter and to thereby exclude the public from the use of the highway is restored."

A preponderance of the evidence in the case at bar supports the conclusion that a public way by prescription had been established over the land now owned by appellant at the time it was purchased by Purcell in 1936. The evidence is insufficient to show that the right thus established has since been abandoned by non-user. While the testimony is conflicting as to whether use of the road since 1938 has been adverse and under claim of right, or permissive, we cannot say that finding of the trial court is against the weight of the evidence as a whole.

Affirmed.

HOPKINS *v.* WILLIAMS.

4-8869 219 S. W. 2d 620

Opinion delivered April 18, 1949.

Ernest Briner, for appellant.

Kenneth C. Coffelt, for appellee.

GRIFFIN SMITH, Chief Justice. The trial Court was asked to reform a deed by which Alice V. Hopkins conveyed to J. L. Williams Lots 1, 2, 3, 4 and 5, 23 and 24, Block Two, Vimy Ridge.[1]

[1] What is now known as Vimy Ridge was formerly the Town of Germania.

Mrs. Hopkins, (Alice Smith before her marriage) bought Lots 1 to 10, inclusive, and Lots 23 and 24, in 1942. At trial she admitted that Lots 23 and 24 were properly conveyed to Williams, but in substantiation of her allegations of mutual mistake asserted that ". . . We had ten lots, and [Williams] got the east half and I got the west half." She also stated that shortly before the deed was made she had started building a new four room house, and that when she sold she moved into the unfinished building. The lots extend east and west. "That," said Mrs. Hopkins, "gives me the west side and [Williams] the east side. He got the seven with the building, and I got five." The lots Mrs. Hopkins "retained" are next to the railroad. Certain improvements were made on a residential plot she used for seven or eight months. A "car barn" was constructed for accommodation of an automobile during the winter. Mrs. Hopkins had been told that property in Vimy Ridge "was all messed up" in respect of lot numbers, so before selling she had been warned to identify corners and

agree on descriptions. Before closing the contract with Williams Mrs. Hopkins went on the property with him. As a result, "he thoroughly understood that the lots would be divided between us." According to Mrs. Hopkins, a part of the work of designation included putting iron stakes in the ground, ". . . and we decided the middle of the road was the dividing point, and I told him so many times, —told him that 'regardless of where it is, I get half of those ten lots, and you get half.' "

In his brief counsel for appellant says the only controversy is whether Mrs. Hopkins sold Lots 1, 2, 3, 4 and 5, or the east half of Lots 1 to 10, inclusive. The testimony is undisputed that in 1942 she paid $2,500 for all of the realty. A store building was on Lots 23 and 24, but there is no issue regarding them or the store building. In selling to Williams, Mrs. Hopkins was paid $3,500 for the real property and $500 for a stock of merchandise. She had made some improvements, including butane gas equipment, five stoves, and some store fixtures. These, she thought, had cost $1,000.

Williams, while not denying that before buying he discussed in general terms what area would be included, testified that the dwelling house, built "approximately on Lot 2," was mentioned as a part of the conveyance, for Mrs. Hopkins, in the conversations, said "the store and dwelling." There was no reference to a division of the lots. Being anxious to get possession of the merchandise as quickly as possible, Williams, knowing that residential property was hard to procure, agreed that Mrs. Hopkins might remain in the unfinished house, and permissively she temporarily retained it. During that period she had the so-called car barn constructed. It was built of 1x6's, with cheap paper for a siding—"just a shed, not a car barn."

Fill Sanders testified that he had known the property for many years and tried to buy what Mrs. Hopkins "had remaining" after she had dealt with Williams. He believed Mrs. Hopkins "thought she had retained one house and five lots." When the witness went to Wil-

liams, the latter undertook to point out the lines, indicating that he did not then claim to have purchased that part of the property upon which the residence was situated.

Much of Sanders' testimony was hearsay and wholly inadmissible, but the record does not show it was objected to. It is certain, however, that a plat, blueprint, or chart of some kind was before the Court, and that locations around which the testimony centered were identified. This plat has not been brought forward, and we must assume that the Chancellor understood it. With us there is unlimited uncertainty. The effect of Sanders' testimony substantiates assertions by Mrs. Hopkins that Williams knew what land was being bought, but when he found (as a result of conversations with Sanders and by reference to plats and an abstract) that the definite descriptions contained in the deed conveyed *all* of the property owned by Mrs. Hopkins in that area, he concluded to keep what the deed called for.

There was testimony that Williams' son tried to buy from Mrs. Hopkins the house she occupied after selling to appellee, and that discussions concerning the property took place after the deed had been executed, and with Williams' knowledge and participation. But Williams flatly denied the substance of Sanders' testimony, and explained that his son was trying to buy Mrs. Hopkins' furniture, and not the house. Insofar as descriptions, lines, boundaries, definite location of buildings, corners, iron stops, etc., are concerned, the record testimony is indefinite, although it was no doubt understood by the Chancellor. In these circumstances we defer largely to the Court's conclusions regarding matters ambiguous in print.[2] *Smith* v. *Magnet Cove Barium Corporation,* 212 Ark. 491, 206 S. W. 2d 442.

[2] An illustration of the difficulty an appellate Court has in determining place, area, and focal points from a printed record from which the plat has been omitted is shown by the following testimony, brought out on cross-examination of Sanders: Q. "You said you were familiar with *that* land *over there?*" A. "Yes, sir." Q. "I will ask you if *this* is a true representation of the way those lots run?" A. "Yes, sir, that is just exactly the way they lay." Q. "*Here* are Lots 23 and 24—no question about those two lots?" A. "The store sits right *in here* on one of *these two lots.*" Q. "Now *here* are Lots 1, 2, 3, 4 and 5?" A. "That's right." Q. "You said Mr. Williams pointed out *this* line:

There is no contention that Williams had anything to do with preparation of the deed. On the contrary, Mrs. Hopkins testified that "I got *her* to make it." There is no identification of "her" other than Mrs. Hopkins' reference to "the woman [who made it for me"]. The inference is quite clear that whatever was said or done regarding descriptions, the result complained of by appellant followed her own initiative in procuring a scrivener who either wrote the deed as directed, or mistakenly described the lots. The deed was not picked up by Mrs. Williams for two or three days. She says that when it was received and acknowledged, no examination was made. Mrs. Williams verified what her husband had testified to regarding the all-inclusive intent to buy what the deed called for.

The rule that a written instrument will not be reformed over the objections of either party unless the evidence of fraud or mutual mistake is clear and convincing has been repeatedly emphasized. *Corey* v. *The Mercantile Insurance Co. of America,* 205 Ark. 546, 169 S. W. 2d 655. In the case before us the trial Court might have thought the evidence preponderated in favor of appellant, but that it was not sufficiently convincing to justify the radical changes contended for. We are of the same opinion. If the Chancellor had believed Sanders' testimony and had rejected what Williams said regarding conversations, we would have a substantial basis for appellant's insistence that the mistake was mutual. No disinterested testimony of a persuasive nature tends to show that Williams intended to buy divided lots. It follows that the decree must be affirmed.

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didn't he point out *this* line: between 5 and 6?" A. "No, sir. Here sits the store: he wasn't out *there.* He was out *here*—this little house sits right here. . . . I am positive. I came up here and drew the plat just like *this.* . . . The store sits right *here.* We walked out *there.* I said [to Williams] 'I want to find out right where you bought to, so I will know how close the line runs here.' He said, 'I don't know where the line is: I haven't had it run.' He pointed to an iron stob as the corner, where Mrs. Hopkins said that was the corner. He said *this* line comes right through here. . . ."

Opinion delivered April 18, 1949.

[redacted]

R. D. Wynne and *Robert Sparks,* for appellant.

Ike Murry, Attorney General and *Arnold Adams,* Assistant Attorney General, for appellee.

HOLT, J. November 16, 1948, appellant, Emma Boyd, a Negro woman, was tried on an indictment charging her with the crime of receiving stolen goods. The jury failed to agree, a mistrial was declared, and thereafter on December 1st, she was again placed on trial, which resulted in her conviction and a prison term of eighteen months in the Penitentiary imposed.

From the judgment is this appeal.

For reversal, appellant presents in her motion for a new trial twenty-one assignments of alleged errors. While she argues but two of her assignments, this being a felony case, she waives none of her alleged errors by not arguing them here.

Briefly, the evidence shows that appellant operated a cafe and sold beer. Percy Alsup, a convict on parole, was employed by the Fordyce Country Club as caretaker, after having served a part of a ten-year term in the state penitentiary. Following his parole, he married appellant's cousin, Ozaree Grimes. It was undisputed that Percy stole some chairs, silverware and dishes, the property of the Country Club, of the value of approximately $75, some of which he sold to appellant. Alsup testified that appellant and his wife, Ozaree, were with him at the time of the theft, that appellant knew the property was stolen and aided and abetted him, that Ozaree asked him not to take the property and warned that he would get in trouble.

Aided by a search warrant, an officer went to appellant's cafe and when he informed her of his mission, she readily produced from under the counter some dishes and some pieces of silverware. She also produced four chairs, but denied knowing that any of the property had been stolen.

In these circumstances, all conceded that Percy was an accomplice, but whether Ozaree was also an accomplice was a question that should have been submitted to the jury.

Under our statute, Ark. Stat., (1947), § 43-2116, an accused may not be convicted on the uncorroborated testimony of an accomplice. The testimony of Ozaree, which tended to corroborate that of her husband, was material, and appellant was entitled to have the jury instructed substantially in the language of the statute, *supra,* had she so requested (*Miller* v. *State,* 155 Ark. 68, 243 S. W. 1063), and she was also, upon request, entitled to an instruction defining the term of "ac-

complice." See *Simon* v. *State,* 149 Ark. 609, 233 S. W. 917, for the definition.

In the present case, it is doubtful if there was any substantial evidence that tended to corroborate Percy and Ozaree, had the jury, under proper requested instructions, found that Ozaree was also an accomplice. She was a State witness and, in the circumstances, appellant was entitled to cross-examine her thoroughly, within reasonable bounds, on all material matters. The court denied appellant this privilege and in so doing, there was abuse of discretion.

Appellant's sixth assignment provides: "The court erred in not permitting defendant to prove that Ozaree Alsup would testify to the jury that 'since she has been out of jail she has been in a very nervous condition' and said, 'Don't let the Sheriff and Percy Alsup get me.' Counsel for defendant stating, 'That is a circumstance I want to get before the jury and argue to the jury.' I would like to cross-examine her on whether or not the Sheriff possibly told her, 'Now you get in and help me send Emma Boyd to the penitentiary and you will not have to be tried,' defendant saving exceptions."

In this connection, the record reflects: "By the Court: Let the record show that E. B. Kimpel, Jr., represents the defendant, with the other counsel, and that he especially represents the witness, Ozaree Alsup, and that the Court has directed that either side may talk to any witness and Mr. Kimpel made his objections and exceptions at the time of the ruling. On the basis of this, Mr. Kimpel is excluded from the Sheriff's office during the questioning of his client, Ozaree Alsup, by the Prosecuting Attorney before the trial, over Mr. Kimpel's objections and exceptions. . . . Whereupon, the State presents the following witnesses before the Court and the jury."

Among these witnesses, as noted, was Ozaree. She was at the time charged with the same offense, lodged against Percy, and was free on bond.

"By the Court: Let the record show that her testimony shows and clearly exonerates her of any part of

this crime and this statement is made outside of the hearing of the jury and the Court is convinced she had nothing to do with this crime and is not guilty of any part of this crime; that she merely told what happened and over her protest the theft was committed; and that she had not testified to anything that would incriminate her at all whatsoever and her statement shall never be used in any prosecution in regard to this thing against her.

"Objection overruled over the objections and exceptions of the witness and defendant.

"Whereupon, at the request of counsel for defendant, the Court retires to Chambers and the following proceedings are had: By Mr. Sparks: Ozaree Alsup will testify that since she has been out of jail that she has been in a very nervous condition and made the statement: "Don't let the Sheriff and Percy get me.' That is a circumstance I want to get before the jury, argue to the jury, the circumstance that she was possibly—I would have liked to cross-examine her. The Sheriff probably told her, 'Now you get in and help me send Emma Boyd to the penitentiary and you will not have to be tried.'

"The Court refuses to permit counsel for defendant to cross-examine the witness, Ozaree Alsup, on this point, over the objections and exceptions of the defendant."

As indicated, we think the court erred in denying appellant the right to cross-examine Ozaree, in the manner requested.

Accordingly, the judgment is reversed and the cause remanded for a new trial.

4-8553 219 S. W. 2d 769

Opinion delivered April 18, 1949.

Rehearing denied May 16, 1949.

[redacted]

W. H. Glover, Carl Langston and *James Sheppard Potts,* for appellant.

A. F. Triplett, Louis Herrink, A. S. Buford, Jr., Hunton, Williams, Anderson, Gay & Moore, for appellee

Joseph Schoolfield Potts, Jr., pro se.

GEORGE ROSE SMITH, J. James Sheppard owned Sheppard Island plantation, in Jefferson County, when he died in 1870. His will directed his two executors to sell the property and divide the proceeds equally among his widow and children. This direction was not followed; instead, in 1876 one of the executors conveyed the property to the widow and children. The validity of the deed was not questioned for more than sixty years. The land has since been devised by various subsequent wills to its present owners.

In 1937 Lisa Shinberger, owning an undivided one-third interest, and the personal representatives of two decedents who were alleged to have been cotenants, brought this suit for partition of the plantation. Lisa Shinberger later withdrew as a plaintiff and aligned herself as a defendant, filing a cross complaint in which she renewed her prayer for partition. Among the other defendants were the appellants, Adam E. and James S. Potts, and their brother, appellee Joseph S. Potts, Jr.

By a decree entered September 2, 1947, the chancellor found the ownership to be a third in Lisa Shinberger, a ninth in each of the three Potts brothers, and the remaining third in three charitable organizations, their interest having been determined upon the first appeal herein. *Sheltering Arms Hosp.* v. *Shinberger,* 201 Ark. 780, 146 S. W. 2d 921. Finding that a partition in kind was not warranted, the trial court ordered a sale. The appeal is from that decree and from a later order refusing to vacate the decree.

Appellants' first contention is that the Potts brothers, as the only surviving descendants of James Sheppard, are the sole owners of the plantation. This argument is based on the theory that the executor's deed of 1876 was ineffective and that James Sheppard's will showed an intent to keep this property in his own family. The contention is without merit. Far from wanting to keep the property in the family, Sheppard directed by his will that it be sold. Although this direction was disregarded, appellants are not in a position to complain. The will did not purport to create a spendthrift trust;

it merely instructed the executors to sell the property and divide the proceeds among the testator's immediate family. Only the beneficiaries of the will could complain of the executors' failure to carry out instructions, but they accepted the deed and recognized its validity, as has the whole family for over sixty years. Any merit that may ever have been in the appellants' contention has been defeated by laches and acquiescence. Too, throughout this litigation both appellants have asserted an interest in the property under their mother's will. She was a grantee in the executor's deed and derived her title from it. The appellants cannot claim title to part of the land in reliance upon the deed and at the same time claim the rest upon the theory of its invalidity. *Wood* v. *Haye,* 206 Ark. 892, 175 S. W. 2d 189.

Appellants insist that a court of equity should not entertain a partition suit when title to the land is in dispute. Even if we consider the Potts claim of sole ownership as having enough merit to make this title a disputed one, the rule does not apply when there is another clear ground of equitable jurisdiction. *Hankins* v. *Layne,* 48 Ark. 544, 3 S. W. 821. Appellants invoked the aid of equity by joining in the plaintiffs' request for the appointment of a receiver, and having done so they cannot now question that jurisdiction. *State, Use Arkansas County* v. *Pollard,* 171 Ark. 607, 286 S. W. 811.

We need not pass upon the question of whether the chancellor should have ordered a division in kind instead of partition by sale. Most of the evidence on that issue was taken before the entry of the order of November 1, 1947, by which the chancellor refused to vacate his earlier decree. The transcript of that testimony was not filed here until October 20, 1948—long after the time allowed by our Rule 5. We therefore sustain the motion to strike this testimony from the record, and without it we must assume that the evidence supported the chancellor's action.

Finally, appellant Adam E. Potts complains of the chancellor's refusal to grant a stay under the Soldiers' & Sailors' Civil Relief Act. That statute requires such a stay unless in the opinion of the trial court the defend-

ant's ability to conduct his defense is not materially affected by his military service. 50 U. S. C. A. App. § 521. In each instance the application is addressed to the trial court's discretion. *Boone* v. *Lightner,* 319 U. S. 561, 63 S. Ct. 1223, 87 L. Ed. 1587.

Colonel Potts had been in the Regular Army for many years before this suit was filed. By his own admission he relied upon his brother James to attend to matters pertaining to this plantation. In 1939 he joined in a verified motion for a continuance upon the ground that James alone was informed as to the details of this case and was too ill to appear as a witness. In that motion Colonel Potts' lack of familiarity with the issues was stressed. Thus it does not appear that as a witness he would be of value in the defense of this suit.

If there were any showing that appellant's military service has impaired his ability to defend, we should indulge every presumption in his favor. But here there is a complete absence of such a showing. It is alleged only that Colonel Potts has in storage at some undisclosed place certain letters and records which he has been unable to assemble in the preparation of his defense. No attempt has been made to state the substance of these documents or their relevance in what is basically a simple partition suit. The pendency of this case for more than four years before Pearl Harbor allowed ample time for the preparation of the defense. Although Colonel Potts served overseas in the early part of the war, he has since had extended tours of duty in this country. He has had numerous opportunities to produce these documents, but there is no evidence that he has shown the slightest inclination to do so.

The record justifies the conclusion that the appeal to the federal statute is made for the purpose of delay, as it was in the *Boone* case, *supra.* Appellant James Potts is an attorney who has been actively connected with this suit since it was filed in 1937. His interest in the plantation is identical with that of Adam Potts, and they are on good terms with one another. The third brother, Joseph S. Potts, Jr., also assisted in the defense of the case; in this court he has filed a brief in support of the

appellants' contentions, although he did not appeal from the decree and has no standing to question it. Adam and James Potts have been in constant correspondence with each other. Colonel Potts has not been in the situation of an isolated soldier with no friend or attorney to appear in his behalf; he has had both, as well as local counsel of unquestioned ability. The principal reason for the long course of this litigation lies in the efforts of the Potts brothers to delay its submission for adjudication. At first it was James' illness and Adam's unfamiliarity with the case that were advanced as reasons for delay; later the documents in storage assumed an importance that was overlooked until the federal statute was enacted. At one time a postponement was suggested because there was pending in Virginia certain litigation that would have a bearing upon this case. The Virginia trial court dismissed at least part of that litigation upon a finding that the progress of the case was being intentionally delayed, and its action was affirmed. *Potts* v. *Flippen,* 171 Va. 52, 197 S. E. 422. There are other instances which we need not mention. We conclude that the record is wholly lacking in evidence to indicate that the chancellor abused his discretion in refusing to stay the proceedings.

Affirmed.

BREWER *v.* THOMASON.

4-8807 219 S. W. 2d 758

Opinion delivered April 25, 1949.

[redacted]

Buzbee, Harrison & Wright, for appellant.

Kenneth C. Coffelt, for appellee.

ROBINS, J. Appellant asks us to reverse judgment against him, in favor of appellee, based on jury verdict for $10,000, for damage sustained by appellee as a result of crash of one of appellant's airplanes in which appellee was riding on December 14, 1947.

There is very little dispute as to the fact situation. Appellant for some time had been operating at Benton an airport under the trade name of "Benton Flying Service." Here he rented out airplanes and gave instructions in flying. Among other students were ex-soldiers learning to operate a plane as a part of the veterans training program. For these the government provided the use of one of appellant's planes and paid appellant tuition for the flight instructions.

One of the veterans receiving such training was Vernon Fulcher, a young man who was working for the Reynolds Manufacturing Company at its nearby plant.

Fulcher had been taking such training for several months and had about 75 hours flying time. He had received a private pilot's license and was legally authorized to take up passengers, but was not allowed to do so on the flying time paid for by the government.

On the day of the crash Fulcher came to the flying field with appellee, his friend and neighbor, and asked for a plane in which to take up appellee. Appellant told him he could rent a plane, but that he, Fulcher, would be required to pay for it, as the government had issued an order refusing to pay for the use of a plane under

such circumstances. To this Fulcher agreed after some hesitation.

Thereupon appellant sent one of his instructors out to crank up the plane, which had already been flown four or five hours that morning. Appellee embarked in the plane with Fulcher and they flew over Benton twice at an altitude of about 2,000 feet, then flew toward their own neighborhood nearby, where the plane was brought down very low so they could identify their homes. According to appellee's account the motor "went dead" and the plane "nosed over" and crashed into a house. Fulcher was killed in the crash and appellee suffered severe injuries.

When the suit was originally brought, liability on the part of appellant was asserted by appellee on the ground that Fulcher was a student of and under instruction and supervision of appellant, and that Fulcher flew the plane in a negligent manner. While the court submitted this theory to the jury it is frankly admitted here by appellee that there was no evidence on which this theory of liability could be based. By an amendment made a short time before the trial appellee predicated liability of appellant on the ground that appellant was negligent in that the motor of the plane which appellant furnished Fulcher was defective and would not operate normally, and that because thereof the plane fell. And this ground—that appellant was bailor of the plane and as such was negligent in hiring to Fulcher a plane not in good flying order is solely relied on here by appellee to sustain the judgment.

Now there is no evidence whatever, save the bare statement of appellee that the motor failed as Fulcher was turning at a very low altitude, from which an inference of bad condition of the motor could be drawn. It had already been flown successfully four or five hours on the same day. An examination of the motor some time after the crash failed to disclose any defect. Appellee testified that he knew nothing about the construction or operation of an airplane.

Now taking appellee's testimony at full value, as we must in a case of this kind, we have, as a basis for the verdict, only the fact that the motor stopped. Appellee's statement does not exclude the possibility of the motor stopping on account of improper acceleration or slowing down, or other improper handling of the motor by Fulcher. In fact, in his complaint filed a short time after the crash he asserted that the negligent handling of the plane by Fulcher caused the accident.

Conceding, for the sake of argument, that there was some defective condition in the motor, what such condition was, and whether it was one such as appellant would have been responsible for, was not shown.

While we must accord much latitude to juries in solving questions of fact, we have always held that their findings must be based on substantial evidence—not on conjecture and speculation. *Magnolia Petroleum Company* v. *Bell,* 186 Ark. 723, 55 S. W. 2d 782; *Missouri Pacific Railroad Company* v. *Shores,* 209 Ark. 539, 191 S. W. 2d 580.

We conclude that there is no substantial evidence in this case to establish such negligence of the appellant as would authorize a finding that any wrongful act or omission on his part caused or contributed to appellee's injury.

Accordingly, the judgment appealed from is reversed and the cause of action having been fully developed is dismissed.

CALDARERA *v.* LITTLE ROCK-PULASKI DRAINAGE DISTRICT NO. 2.

4-8863 219 S. W. 2d 759

Opinion delivered April 25, 1949.

Lee Cazort, Jr., for appellant.

Leon Catlett and *L. P. Biggs*, for appellee.

ROBINS, J. Appellants own land situated in appellee, Little Rock-Pulaski Drainage District No. 2 of Pulaski County, organized for the purpose of protecting, by levee and drainage works, lowlands in the eastern part of the City of Little Rock and suburban territory adjacent. This district was created under authority of Act No. 279, approved May 27, 1909, and Acts supplemental and amendatory; and certain phases of the procedure to organize it were before us in the case of *Lessenberry* v. *Little Rock-Pulaski Drainage District Number 2*, 211 Ark. 1046, 204 S. W. 2d 554.

A portion of appellants' land being required for use as right-of-way for the levee appellee proceeded to condemn same, under the method authorized by the statute (§ 3, Act 177 of 1945).

Appraisers were appointed and they made a written report, awarding appellants $600 as damages for taking of the right-of-way. This award was filed in the office of the circuit clerk on October 28, 1947; and summons issued thereon was served on each of appellants on October 31, 1947. Under the above statute, any property owner, whose land is thus condemned, may, within ten days after such award is filed and service of summons thereon had, file exceptions to such award, whereupon a jury trial as to the correctness of the award may be had.

Appellants did not file any timely objection to the report of the appraisers; and the circuit court took no action thereon until May 26, 1948, at which time it entered a judgment of condemnation in favor of the district for the right-of-way and against the district for the sum fixed as compensation by the appraisers. This judgment was authorized by the following portion of § 3, Act 177 of 1945: " . . . if no exception is filed by the owner, or owners, within ten days after service of summons, or within ten days of the last date of the publication of the warning order, or by the levee or drainage district, within ten days after award is filed, then it shall be the duty of the clerk of the circuit court to call the court's attention to the award, and failure to file exception thereto after notice having been given as herein provided, and upon such information, the court shall proceed to enter a judgment condemning such property and land for the right of way purpose, and a judgment in favor of the owner, or owners, of such land against the levee or drainage district for the amount awarded by such appraisers; but, in case exceptions are filed by either party, within the time herein prescribed, it shall be the duty of the clerk to docket the cause."

On July 21, 1948, but at the same term of court at which the judgment of condemnation had been entered, appellants filed a motion to vacate the judgment which had been entered. They set up in their motion that they had employed attorneys who, appellants believed, were to protect their interests in the right-of-way matter but whose work, it later developed, consisted only in attacking the assessment; and they alleged that the award made to them for their right-of-way was so grossly inadequate as to amount to confiscation of their property.

The lower court sustained appellee's contention that the attack of appellants on the award by the appraisers came too late and denied the motion to vacate.

There can be no disagreement with the soundness of appellants' argument that until lapse of the term at which an order is made the court has control of any

such order. But, if the judgment of condemnation here involved should be set aside it would afford no relief to appellants, because they did not except, within the ten-day period fixed by law, to the award of the appraisers, and not having done so they cannot be heard, after that period, to protest.

There are many statutes relating to public improvements, whereby the property owner is afforded a comparatively short period—from ten days to thirty days—in which to protest against steps, taken in organization of improvement districts involving his land, such as the assessment of benefits, assessment of damages, and contest of sufficiency of petition. These statutes have been uniformly upheld by us as a valid exercise of legislative power. *Summers* v. *Conway & Damascus Road Improvement District of Faulkner County,* 139 Ark. 277, 213 S. W. 775; *Sain* v. *Cypress Creek Drainage District,* 161 Ark. 529, 257 S. W. 49, 258 S. W. 637; *Dickerson* v. *Tri-County Drainage District,* 138 Ark. 471, 212 S. W. 334; *Kelleher* v. *Subsidiary Drainage District No. 11 of the St. Francis Drainage District,* 170 Ark. 1138, 282 S. W. 988.

Appellants failed to file exceptions to the allowance for right-of-way made to them by the appraisers until long after the expiration of the time in which the law permitted them to make such objection.

The judgment of the lower court denying their motion to vacate was therefore correct and is affirmed.

MAGNET COVE BARIUM CORPORATION *v.* WATT.

4-8835 219 S. W. 2d 761

Opinion delivered April 25, 1949.

Joe W. McCoy, for appellant.

MINOR W. MILLWEE, Justice. Appellee brought an action and recovered judgment against appellant in the Malvern Municipal Court for damages to personal property in the sum of $150. Appeal to circuit court resulted in a verdict and judgment in favor of appellee for $75 and this appeal follows.

Appellant's contention, that the judgment is void for lack of jurisdiction of subject matter, must be sustained. The municipal court has jurisdiction concurrent with justices of the peace and the circuit court in actions for damages to personal property where the amount in controversy does not exceed $100. Ark. Stats., (1947), § 22-709. The jurisdiction of a court is determined by the amount sought to be recovered and not merely by the amount of the actual recovery. As the damages claimed exceeded $100 and arose out of an action for damages to personal property, the municipal court had no jurisdiction over the subject matter of the controversy, and the circuit court acquired none on appeal. Article 7, § 40, Constitution of 1874; *St. Louis Southwestern Ry. Co.* v. *O'Neal,* 163 Ark. 193, 259 S. W. 393; *Hively* v. *Jones,* 178 Ark. 1127, 13 S. W. 2d 612.

The question of jurisdiction of the subject matter cannot be waived, but is always open and may be raised for the first time on appeal. *Sibley, Receiver,* v. *Leek,* 45 Ark. 346; *Price* v. *Madison County Bank,* 90 Ark. 195, 118 S. W. 706; *Strahan* v. *The Atlanta National Bank,* 206 Ark. 522, 176 S. W. 2d 237.

The judgment is accordingly reversed, and the trial court being without jurisdiction, the cause is dismissed without prejudice.

BEN F. LEVIS, INC., v. COLLINS.

4-8707 219 S. W. 2d 762

Opinion delivered April 25, 1949.

[redacted]

Norton & Norton, for appellant.

Mann & McCulloch, for appellee.

GEORGE ROSE SMITH, J. Appellant brought this action to recover installments said to be due under a contract by which it was to act as the appellees' resident buyer in New York City. The appellees, Collins and Ingram, are partners who own dry-goods stores in Forrest City and Wynne. By the terms of the written agree-

ment the partnership employed appellant corporation for a period of six months beginning November 1, 1946, and agreed to pay $75 monthly for appellant's services. The installment for November was paid when due, but that was the only payment made by appellees. Their defense is that the appellant failed to perform its part of the agreement, as it did not buy any merchandise for appellees until April, 1947, when appellant caused to be shipped to the partners a number of blouses that were rejected. The appeal is from judgment upon a verdict for the appellees.

The pivotal question is whether the appellant was required by the contract to purchase merchandise for appellees on its own initiative or was to await orders from its principals. In this respect the contract is ambiguous, as it merely states that appellees employ appellant as their resident buyer. That term is not defined, nor does the agreement specify the duties undertaken by appellant in that capacity. Parol evidence of the antecedent negotiations of the parties was admissible to explain the meaning of this doubtful term. *Mays* v. *Barnett,* 150 Ark. 492, 234 S. W. 488. Hence the court properly permitted Collins to relate a long distance telephone conversation between him and Ben F. Levis, president of appellant corporation. Levis called Collins in September, 1946, when there was a shortage of many articles ordinarily sold by appellees. Levis assured Collins that by November 1 the appellant would be able to obtain for the partnership the items needed. Collins agreed to employ appellant and detailed a list of articles in critical demand. From this evidence the jury could have found that appellant was to purchase merchandise without waiting for orders in addition to the list originally provided.

Appellant also recognized the existence of ambiguity by offering to prove that in New York the custom among resident buyers is for them to buy goods only upon orders from their principals. The court correctly excluded this testimony. A custom may be shown as an aid to interpretation if it is known to both parties or is such a widespread trade usage that the contract will be

presumed to have been made with reference to it. Appellant's evidence proved a custom local to New York, but failed to establish appellees' knowledge or notice thereof. Without the latter element the testimony was inadmissible. *Markstein Bros. Millinery Co.* v. *J. A. White & Co.,* 151 Ark. 1, 235 S. W. 39. Later in the trial Collins admitted that he had previously dealt with two New York resident buyers and was familiar with their custom, though he did not say what it had been. We need not determine whether these bare admissions supplied a sufficient foundation for appellant's proof as to custom, for the evidence was not offered again for the court's consideration.

Aside from these matters of evidence, the only question is whether appellant breached the contract before the December payment was due. There was sufficient testimony to support the view that appellant's duties as resident buyer required it to supply at least some merchandise in November and that its failure to do so was a breach of the contract. If so, appellant is not in a position to take advantage of a later breach by the appellees. *Mo. Pac. Ry. Co.* v. *Yarnell,* 65 Ark. 320, 46 S. W. 943.

Affirmed.

CONTINENTAL CASUALTY COMPANY *v.* SPEER.

4-8798 219 S. W. 2d 763

Opinion delivered April 25, 1949.

Adams & Willemin, John M. Lofton, Jr., and *Owens, Ehrman & McHaney,* for appellant.

Giles Dearing, for appellee.

GRIFFIN SMITH, Chief Justice. John Henry Speer died July 31, 1947, from a gunshot wound. The circumstances were such that family, friends, and officials who were called, believed that the .22 calibre rifle bullet entering Speer's head slightly above the right eye was fired with suicidal intent. There was no inquest.

Speer carried insurance with three companies: Pacific Mutual, Continental Casualty, and Brotherhood of Locomotive Engineers. The latter paid without suit.

The $2,000 policy by Pacific Mutual was against death through accidental means, excluding suicide. Continental Casualty would pay $1,000 for accidental death, suicide excluded, plus twelve times the amount of a stipulated accident indemnity of $60 per month,—$720.

Bessie L. Speer, beneficiary named in each of the policies, demanded payment under claim that her husband's death was accidental. In addition to the contention that suicide avoided the policies, each Company denied knowledge of the other's insurance, and pleaded a contractual provision for proportional reduction of the amount payable.

Sufficiency of the Evidence.—Appellants think they should have had instructed verdicts based on the proof of suicide. This would require a determination here

that the presumption against self-destruction was overcome by inferences from physical facts. Stated differently, our finding would be that the position of Speer's body when found, the location of the wound, and the relative situation of gun and body, pointed absolutely to a purposeful act. There was testimony, however, that the single-shot bolt-action rifle could be unintentionally discharged. The mechanism was worn, or defective to such an extent that if the weapon were "cocked" it could be fired by touching the "bolt," and without reference to the trigger.

In spite of assertions by witnesses that for several hours before death Speer had been drinking, the jury could have believed those who discounted the assertion of appreciable intoxication; nor can it be said that a motive was shown. Speer was 38 years of age, lived with his wife in the City of Wynne, and had four children. He earned approximately $300 per month as a Missouri Pacific fireman. Mrs. Speer had a separate income from services as clerk in a local grocery store. During the fateful day Speer expressed an intent to report for duty, but shortly before the tragedy he sent a note to the foreman, explaining that illness had intervened. No one was in the room when the weapon was discharged. A witness stated that when she discovered the body Speer was lying with his head on a pillow, with his feet crossed at the foot of the bed: "He was on his back just as though asleep. The gun was across his body with the muzzle toward his face, at a slight angle. His left hand was holding the barrel of the gun and his right hand [was at] the trigger guard."

The gun was not introduced as an exhibit, although the record shows that it was displayed at trial. There is an inference that demonstrations incidental to testimony of the witness Penix (one familiar with firearms) emphasized the mechanical fault which might allow the firing pin to function without use of the trigger. It is argued that Speer—who kept the gun within easy reaching distance of the bed—may have concluded to clean the barrel, and was looking down from the muzzle when the accident occurred. If we should agree

that in the light of all circumstances this was highly improbable, the alternative is that it was not impossible. We conclude, therefore, that the defendants did not overcome the presumption against suicide. Availability of the gun for examination could conceivably present a different record.

Copies of Letters.—Appellants' counsel propounded to an official of each company interrogatories designed to bring into the record certain transactions with Speer that might affect the policies. The interrogatories were not crossed by the plaintiff. When at trial appellee under guidance of her attorney undertook to testify that as agent for Speer she wrote to the defendants, informing each that the other had issued a policy, objections were interposed on the ground that the original letter would be the best evidence. Mrs. Speer then stated that she retained carbon copies, and replies were received and placed with her husband's books and papers, but after Speer's death the answers were unintentionally destroyed when a room was renovated, but the copies were saved. The originals, said Mrs. Speer, were written on a common ruled tablet, such as would be used by a child for school work. The carbon copies bore date of July 20, 1946,—nineteen days after issuance of the policies. The originals were properly addressed, stamped, and posted.

At the time these letters are alleged to have been written, Mrs. Speer and her husband were living on a farm near Colt, in St. Francis County, and there was no thought of litigation. It was not contended that the purpose was to put each company on notice of the other's policy. On the contrary, Mrs. Speer testified that because of a disparity in premium rates, she wanted an explanation, hence the inquiries.

Appellants' interrogatories were not directed to this specific transaction for the reason, as counsel explained, that there had been no intimation such a claim would be advanced; and general explanations in response to direct interrogatories were not sufficient to meet the issue. When overruled on this point the defendants

pleaded surprise and asked for sufficient time to communicate with the companies' home office, and to make inquiry regarding collateral matters touching the contention that the copies were genuine. The motions were overruled and exceptions saved.

We think the trial Court underestimated the importance to appellants of an unimpaired opportunity to defend against a situation reasonable foresight might not have anticipated. The purpose of trial is to administer justice within the law. The interrogatories were forwarded at a time when there had been no hint of an intention to claim, through incidental references in letters not written for that express purpose, notice of plural insurance; hence, when company officials responded to the inquiries, they had no reason to make the thorough search one might be expected to engage in when a particular thing could have been misplaced; nor could they, if convinced that the described letter had not been received, make the characteristic denial that ordinarily attends emphatic disclaimer.

While counsel for appellee no doubt felt that he was justified in offering the copies when the companies inferentially denied the originals by failing to mention them, we think the better practice, and the procedure more nearly conforming to statutory intent, required a demand for the originals. Pope's Digest, §§ 5147-48. See *Heard* v. *Farmers' Bank of Hardy,* 174 Ark. 194, 295 S. W. 38; *Union Central Life Ins. Co.* v. *Mendenhall,* 183 Ark. 25, 34 S. W. 2d 1078.

For the errors indicated the judgments are reversed.

ARKANSAS REAL ESTATE COMPANY, INC. *v.* KEATON.

4-8833 220 S. W. 2nd 129

Opinion delivered April 25, 1949.

Rehearing denied May 30, 1949.

John R. Thompson and *Wm. J. Kirby,* for appellant.

Buzbee, Harrison & Wright, for appellee.

ED. F. MCFADDIN, Justice. Appellant and appellee were rival claimants to the ownership of a tract of approximately six acres lying on the outskirts of Little Rock. The original owner—insofar as concerns this suit—was W. W. Wilson. Appellee claimed title by virtue of a warranty deed from the heirs of Wilson; appellant claimed by virtue of (1) a tax title and (2) a deed from Fred Durst, who—appellant contends—acquired title by adverse possession against Wilson.

Appellee (as plaintiff) filed suit in the Chancery Court, and deraigned his own title and asked that it be quieted. Appellant corporation (as defendant) filed a general denial, and also affirmatively asserted Durst's adverse possession and his deed to the defendant. The

prayer of the answer was that the defendant's title be quieted. From a decree quieting the plaintiff's title, the defendant brings this appeal.

I. *Defendant's Tax Title.* Before this Court the defendant is seeking to prevail on its tax title because of plaintiff's failure to offer any proof of the invalidity of the tax forfeiture. In the complaint it was alleged that the defendant acquired a deed from the State in 1946, that the State's claim was based on a 1932 tax forfeiture, that the tax forfeiture was void, and that a tender had been made of all taxes. The plaintiff alleged, as one of the reasons for the invalidity of the 1932 tax forfeiture, that the tax sale price included a tax of 5/8ths of a mill[1] for the Firemen's Pension and Relief Fund of Little Rock, and that this was in excess of the five mills allowed for city purposes.

In its answer defendant denied generally all allegations of the complaint, and the effect of this denial extended not only to the invalidity of the tax sale, but also to the existence of the tax deed. So, if the invalidity of the sale was not proved, neither was the existence of the defendant's tax deed established. The alleged deed from the State to defendant was never introduced in evidence. Neither was there any sufficient attempt to prove that the defendant had such deed. All that appears on this point, in the transcript, is an exhibit prepared by the Pulaski County Clerk, showing the record of tax payments by W. W. Wilson and his estate from 1914 to 1932; and this exhibit says of the land here involved: "This call was sold to the State for the 1932 tax. . . . This call was bought in by Arkansas Real Estate Company."

The foregoing quoted statements are contradictory, since at the collector's sale the land could not have been "sold to the State", and at the same time be "bought in by the Arkansas Real Estate Company." Furthermore, this tax record statement does not negative a pos-

[1] As a matter of information (not proved in this case) we call attention to the fact that in each of the cases, *Adamson* v. *Little Rock*, 199 Ark. 435, 134 S. W. 2d 558, and in *Schuman* v. *Walthour*, 204 Ark. 634, 163 S. W. 2d 517, we held to be void a tax sale which included this item.

sible redemption; and is entirely inadequate proof that a deed of any kind was ever issued by the clerk, either to the State or the Arkansas Real Estate Company.

From the condition of the record before us, we conclude that the defendant abandoned in the trial court all reliance on its alleged tax title, and that such abandonment accounts for the failure of the plaintiff to prove the invalidity of the tax sale. We are strengthened in this conclusion by the existence of a stipulation made between the parties during the course of the trial, and reading: "It will be ascertained from the State Land Commissioner what taxes are due on this land based on the assessment that they forfeited for in 1932 down to the present time, and Mr. Keaton will pay that amount into the registry of the court."

The fact that defendant stipulated "what taxes *are* due", and that such amount might be paid into the registry of the court, indicates that the defendant was not then claiming that it had paid all taxes under a valid tax deed based on any forfeiture. We therefore hold the defendant abandoned its tax title claim in the trial court, and cannot rely on it in this Court.

II. *Defendant's Title Acquired from Durst.* On March 27, 1947, Fred Durst executed a quitclaim deed to the defendant; and the real issue in the trial court was whether Durst had acquired the property by adverse possession so as to invest the defendant with a title.

Durst testified that he held the land adversely for many years (in excess of seven) before making the deed to defendant; but Durst's testimony was successfully impeached. It was shown that prior to the institution of this suit, Durst had informed other people that he never claimed any interest in the land, and had all the time occupied it by permission of Wilson. Besides Durst, other witnesses called by the defendant testified that Durst used the land for pasture purposes; but such testimony by these other witnesses was inconclusive, and insufficient to establish that Durst's possession was adverse rather than permissive.

From the evidence, the Chancery Court might well have found that Durst's possession was originally by permission of Wilson, and never became adverse within the purview of our cases, such as *Dial* v. *Armstrong,* 195 Ark. 621, 113 S. W. 2d 503; *Norman* v. *Sharp,* 206 Ark. 744, 177 S. W. 2d 401; *Masters* v. *Haynes,* 169 Ark. 1177, 278 S. W. 12; and *Fry* v. *Grismore,* 151 Ark. 4, 235 S. W. 373. See, also, other cases collected in West's Arkansas Digest, "Adverse Possession", § 85(4). We cannot say that the decree of the Chancery Court is against the preponderance of the evidence. There remains in the registry of the Chancery Court the tax money deposited by appellee, which may now be distributed.

Affirmed.

ARKANSAS POWER & LIGHT COMPANY *v.* PRINCE.

4-8856 219 S. W. 2d 766

Opinion delivered April 25, 1949.

House, Moses & Holmes, for appellant.

J. C. Cole, for appellee.

HOLT, J. John M. Prince, appellee, sued appellant, Power Company, for a substantial sum to compensate for personal injuries alleged to have been received at about 3:30 in the afternoon on January 15, 1948, while he was assisting his brother and father in lifting a 1¼-inch metal pipe from a well and the pipe came in contact with a 7,620-volt electric wire. He alleged, in effect, (1) that appellant was negligent in stringing its uninsulated wire over the corner of his brother's, B. L. Prince, yard without right and was a trespasser, (2) that its power poles so resembled telephone poles as to confuse appellee, (3) that appellant strung its uninsulated wires at an insufficient height to prevent physical contact, and (4) allowed the electric wire in question here to sag to a point where it would be dangerous.

Appellant denied any negligence on its part and affirmatively pleaded contributory negligence of appellee.

From a judgment in the amount of $1,500 is this appeal.

For reversal, appellant earnestly contends (1) that there was no substantial evidence to support the verdict and that the court erred in refusing its request for an instructed verdict at the close of all the testimony, (2) that there were errors in certain instructions, and (3) that the verdict was excessive.

The conclusions we have reached make it necessary to consider appellant's first contention only—the sufficiency of the evidence.

The evidence, considered in the light most favorable to appellee, as we must, was to the following effect. Appellee's brother, B. L. Prince, owned a 163-acre farm on Route 2, Bismarck, Arkansas, near the Caney Community, at an intersection of the highways to Hickory Grove and Antioch. At the time of the injury, appellee and his father were employed by, and assisting B. L. Prince, in lifting a 30-ft. water pump pipe from a well in the front yard of B. L. Prince, when the pipe, while thus being elevated, swayed approximately 9 feet from

perpendicular, came in contact with appellant's high voltage uninsulated electric wire, resulting in appellee's injury. The wire in question was approximately 23 feet from the ground with no appreciable sag. The power line was of recent and general approved construction, having been placed there in March, 1947, and was installed according to the standards set forth by the U. S. Department of Commerce and the Arkansas Public Service Commission, in fact, appellee so conceded.

Appellant's witness, Walsh, an electrical engineer, on direct examination, testified that the high voltage wire in question was 23 feet above the ground and that there was a neutral wire beneath 20 feet from the ground which carried no electric current, that "the code requires that wire be 19 feet high." "Q. Now, what does the regulations of the Department of Commerce require for a line of that kind to be above the ground for that voltage? A. Well, that type of line is covered by a safety code and Rule 232A entitled Basic Clearances, and at that particular location comes under the designation. . . . The Court: For the particular place over there read the regulations pertaining to that requirement and that will be sufficient. A. Locations entitled Public Streets, Alleys or Roads in urban or rural districts, now for lines of voltage. . . . Mr. Cole: If it will help any and to save time, the plaintiff admits into the record that the construction of the line so far as the type of material and the height from the ground and the type of pole and type of insulators all meet the requirements."

Appellee knew that appellant's high voltage wire was strung on poles along the highway, but did not know that it was over a part of his brother's yard, as indicated. He knew that his brother, B. L. Prince, had electricity in his home. He had helped his brother install the electric pump at the well and testified that the electric current leading from the house to the pump had been cut off, in fact, the wires disconnected and laid back. He testified that he did not know that the wire in question was above the well, but admitted that it was

in plain view and that there was nothing to prevent his seeing it had he looked.

In these circumstances, the burden was on appellee to establish some act of negligence on the part of appellant before he could be entitled to recover.

After a careful review of all the testimony, we are unable to find any substantial evidence of any act of negligence on the part of appellant that would warrant recovery.

Appellee conceded that appellant had constructed its practically new line in a modern and approved manner, as above indicated. It was in a rather sparsely settled farming area and the line was in plain view for all to see. He argues, however, that since there was substantial evidence that appellant was a trespasser, or had erected the line in question over the corner of his brother's yard without right, this was such negligence as would justify a recovery. We cannot agree.

The rule in a trespass situation is stated in 18 Am. Jur., § 96, p. 490, as follows: "On or Over Private Property. . . . Thus, the Company is liable where . . . it maintains an uninsulated high-voltage wire over farm land and the owner thereof was killed when an iron pipe he raised over his head came in contact with the wire (which was 17 ft. above the ground). But the circumstances must be such as to show some negligence on the part of the electric company. The mere maintenance of the high-tension transmission line is not wrongful; and in order to hold the owner liable for an injury, he must be shown to have omitted some precaution which he should have taken."

In the case, in support of the text, cited by the text writer (footnote 17), *Card* v. *Wenatchee Valley Gas & E. Co.* (1914), 77 Wash. 564, 137 Pac. 1047, the principle act of negligence on which recovery was allowed was the fact that the wire in question was strung only 17 feet above the ground. Here, the wire was 23 feet above the surface, in a sparsely settled rural community in plain view.

We said in *Arkansas General Utilities Company* v. *Wilson, Adm'r,* 197 Ark. 351, 122 S. W. 2d 956: " 'We have repeatedly held that it was the duty of the company to keep its appliances in safe condition, and that either the wires must be kept insulated, or must be so located as to be, comparatively speaking, harmless. If the company does not choose to properly insulate a deadly wire of its maintenance, it must place the same under ground, at a high altitude, or at some inaccessible place.' Stringing the wire twenty-two feet above the path would appear to be placing it at an inaccessible place, where insulation would not be required, as no one would likely come in contact with it in that position. We think, therefore, that it was error to predicate negligence upon the failure to insulate."

In *Arkansas Power & Light Company* v. *Hubbard,* 181 Ark. 886, 28 S. W. 2d 710, Mrs. Hubbard was assisting others in erecting a sign in front of her husband's place of business. They were raising a pine pole from 24 to 25 feet long to be set in a hole some four feet deep. The sign was attached to the pole. There was a high voltage uninsulated transmission wire about 19 feet overhead. As the pole was being raised into position, the sign, attached to it, contacted the live wire and appellee was injured by the current. There were four people attempting to raise the pole. We there said: "It must have been apparent to any one of ordinary prudence that there was danger that the pole might fall before it reached the perpendicular, and was set in the ground, and that, if this happened, the pole would come in contact with the bare high-tension wires of the appellant. The appellee knew that the transmission wires were electric wires, but seeks to avoid the consequences of her negligent act by the statement that she did not know the wires were dangerous. . . .

"In the case at bar the appellee is a woman of mature years and of sound business judgment, and at least of ordinary intelligence, for she is shown to be capable of managing the business in which she and her husband are engaged, and of earning more than $100 a month. Electricity is used in connection with her busi-

ness; her home and place of business are lighted by electricity. Appellee must have known that the transmission line, before reaching her place of business, had served others along its route, and that it extended on beyond to a neighboring town carrying on its wires the energy sufficient to serve the needs of that community. Common experience and observation must have given her knowledge that these wires carried a considerable voltage, and that they were dangerous, and whether or not she knew of the dangerous character of the transmission wires, the true test is, what would one of ordinary prudence and caution be presumed to know with reference to such wires, and what would one of such caution and prudence do or refrain from doing under similar circumstances? *St. L. S. F. R. Co.* v. *Carr,* 94 Ark. 246, 126 S. W. 850; *Bulman Furn. Co.* v. *Schmuck,* 175 Ark. 442, 299 S. W. 765, 55 A. L. R. 1039. . . .

"Under the undisputed facts of this case, we are of the opinion that the appellee was guilty of negligence contributing to her injury, which bars recovery on her part. The judgment of the trial court is therefore reversed, and the cause is dismissed."

For the error indicated, the judgment is reversed and since the cause appears to have been fully developed, it will be dismissed.

Justices McFaddin and Millwee dissent.

Justice George Rose Smith concurs.

Campbell *v.* Beaver Bayou Drainage District.

4-8828 219 S. W. 2d 934

Opinion delivered April 25, 1949.

Rehearing denied May 23, 1949.

Dinning & Dinning, for appellant.

Burke, Moore & Burke, for appellee.

Ed. F. McFaddin, Justice. The Beaver Bayou Drainage District was created by Act 92 of the Acts of the Legislature of 1907; and the Act was amended by Act 379 of 1911 and also by Act 154 of 1913. Then the Legislature, by Act 370 of 1920, confirmed the assessment of benefits in the District, and authorized the commissioners to continue to collect assessments for maintenance of the drainage system after the bonds had been paid that were to be issued for construction. The improvements contemplated by the said legislative enactments were made about 1921. The bonds issued to pay for the improvements were finally retired in 1947; and slightly less than $200,000 of the original assessed benefits, not having been used for retiring the bonds, remained as potentially susceptible of use for maintenance.

In December, 1947, the commissioners of the District, directed that a levy of 2½% be collected on the assessed benefits, the proceeds of such collection to be used for maintenance work which had been neglected for many years, while current collections were being used to retire the outstanding bonds. In March, 1948, appellants, Campbell and other landowners as plaintiffs, filed suit in the Chancery Court, seeking to prevent the District (defendant below and appellee here) from collecting any further assessments. The plaintiffs also made

other attacks on the District, and on the procedure pursued by the Commissioners. After hearing the evidence the Chancery Court dismissed the complaint, and this appeal challenges the chancery decree.

In the complaint filed in the Chancery Court multiple attacks were made on the Act creating the District, as well as on the actions of the commissioners; but on appeal to this Court only two main points are argued. Under our well-established holdings, in a civil case all assignments not argued in the briefs are considered to be waived;[1] so we proceed to discuss the points contained in appellants' brief.

I. *Constitutionality of Act 370 of 1920.* Appellants say:

"Under the powers undertaken to be granted by that Act, the Directors of the appellee district have undertaken to manage the affairs of the district since February 26, 1920, and are at this time undertaking to exercise the powers given under that Act.

. . . . . .

"The Act in question was unconstitutional and void from its beginning, for the following reasons:

"1. It created a Board of Commissioners of the District and named the members and provided that they should perpetuate themselves in office indefinitely.

"2. It authorized them to levy assessments against the lands embraced in the district at their pleasure, and for any purpose (for) which they might desire to use the proceeds of same.

"3. It authorized the directors without approval of any court to enlarge and deepen existing canals, and to construct new lateral canals at their pleasure, without consulting the owners of the property, or without procuring any authority from any court."

As to appellants' first ground of attack (*i. e.,* the Legislature naming the commissioners and allowing

[1] *Plunkett-Jarrell Grocer Co.* v. *Freeman,* 192 Ark. 380, 92 S. W. 2d 849, and see cases collected in West's Arkansas Digest, "Appeal and Error," § 1078.

them to fill vacancies in certain cases) we need only point out that in *Reitzammer* v. *Desha Road Imp. Dist.*, 139 Ark. 168, 213 S. W. 773 we stated that it was within the power of the Legislature, in creating special improvement districts, to name the commissioners and to allow them to fill vacancies on the Board of Commissioners.

As to the appellants' second ground of attack (*i. e.*, levy of assessment of benefits), the Legislature confirmed the assessment of benefits, and empowered the commissioners to collect such portions of the assessed benefits as might be required from time to time to satisfy the obligations of the District and maintain the improvement. Similar legislative enactments have been upheld in the cases of *North Ark. Highway Imp. Dist.* v. *Rowland,* 170 Ark. 1168, 282 S. W. 990 and *House* v. *Road Imp. Dist.,* 158 Ark. 330, 251 S. W. 12.

As to the appellants' third ground of attack (*i. e.*, empowering the commissioners to construct new lateral canals), it is sufficient to say that this litigation does not present a situation in which the commissioners are attempting to construct any new improvement. All that the commissioners in this case now propose to do is to clean out existing ditches, and certainly it was within the power of the Legislature to authorize the maintenance in good condition of the ditches which were constructed for the benefit of the property in the District, and which property the Legislature—within its power as shown by the cases previously cited—determined to be benefited by the improvements.

To summarize: we hold that Act 370 of 1920 is valid as against the attacks here made on it.

II. *Effect of Act 227 of 1927 on Act 370 of 1920.* Appellant says: "It is rather remarkable that a board of commissioners, undertaking to manage as large an operation as that of financing a district that has 50,000 acres of land, should, for a period of twenty years, ignore or disregard Act 227 of the Acts of 1927, as construed by this court in the case of *Berry* v. *Cousart Bayou Drainage District,* 181 Ark., at page 974, 28 S. W.

2d 1060. Not the slightest attempt has been made to comply with the general statute of the State of Arkansas, passed for the purpose of regulating the operation of drainage districts, and of fixing the powers and obligations of the persons undertaking to discharge the duties as managers."

The above-quoted language poses the question listed in this topic heading. Act 227 of 1927 is entitled, "An Act in Aid of Drainage Districts Formed under Special Laws." The Act contains a preamble, which reads:

"Whereas, there are in this State many drainage districts created by Special Laws, which need amendment, but which cannot be amended under the present constitutional restrictions; and

"Whereas, the general drainage law, which appears as Act number 279 of the year 1909, furnishes an adequate uniform system for the operation of drainage districts:"

The Act then provides:

"Section 1. All drainage districts created by special acts are hereby made drainage districts under the term of Act Number 279 of the Acts of the General Assembly of the State of Arkansas of the year 1909, as amended, said Act being entitled, 'An Act to provide for the creation of drainage districts in this State', approved May 27, 1909, with all the powers conferred by said Act No. 279, and with all the liabilities and restrictions thereby imposed. Provided, nothing in this Act shall be construed as taking away from any improvement district created by special acts any powers which are thereby conferred upon it, nor shall it displace any commissioners or directors of such districts now in office."

Appellee Beaver Bayou Drainage District is a "special district", in that it was created and empowered by special acts of the Legislature. Special acts were common practice until the adoption by the People of Constitutional Amendment 14 at the General Election in 1926. Prior to that Amendment the Legislature had

from time to time amended and enlarged the special acts, just as in the case at bar by the Acts first mentioned in this opinion, and affecting this District. But after the adoption of Amendment 14 in 1926 the Legislature was powerless to amend special laws; nevertheless, the Legislature desired that various improvement districts created by special acts should enjoy enlarged powers, so Act 227 of 1927 was adopted. The proviso of section 1 of that Act, as previously quoted, says:

"Provided, nothing in this Act shall be construed as taking away from any improvement district created by special acts any powers which are thereby conferred upon it, nor shall it displace any commissioners or directors of such districts now in office."

It is clear that the legislative intent was—and we so hold—that any special district created prior to 1926 continues to enjoy and exercise all the powers that such district had under its organic law. And, in addition, every special district also enjoys and may exercise all the powers allowed to districts created under the general law (that is, Act 279 of 1909 and amendments, and known as the Alternative Drainage District Law); but in the enjoyment of the enlarged powers allowed by the provisions of the general law, the special district must exercise such enlarged powers in the manner provided by the general law.

In the case at bar all the powers that the appellee district is seeking to exercise at this time are the powers that the district enjoyed under its special law, since the applicable portion of section 7 of Act 370 of 1920 reads: ". . . the directors are authorized and directed to constantly maintain such improvements by keeping the canals and ditches cleaned out and open and to pay therefor from the assessment of benefits, . . ."

So we hold that Act 227 of 1927 does not restrict the appellee district and its commissioners in what is now being undertaken in the case at bar.

Appellants cite and strongly rely on the case of *Berry* v. *Cousart Bayou Drainage Dist.*, 181 Ark. 974, 28 S. W. 2d 1060 as being applicable to the case at bar;

but a careful study of the case shows that it is distinguishable on the facts, and that its holding was not directed to a situation similar to the one which now confronts us. In all instances courts should be guided by the real holding—*i. e.*, the essential—rather than by the *dicta*—*i. e.*, the incidental, in previous cases.[2] In the Berry-Cousart case the District had been created by a special act (Act 283 of 1907), and its powers had been enlarged by a subsequent special act (No. 677 of 1923). The opinion of this Court recites: "The system is inadequate, and does not properly drain the lands within the district. The work provided for by the plans has been completed."

With that situation confronting it, the Cousart Bayou District then undertook to add certain territory and assess the benefits against some of the land in the added territory, and then to pledge all old unused benefits and all new beenfits for a new bond issue, the proceeds of which were to be used to perform work not contemplated originally. It is clear that, in starting a new improvement, the District was putting itself within the purview of the general law (the Alternative Drainage District Law), rather than continuing to proceed exclusively as a special district for its original purpose. While the organic acts of the Cousart Drainage District contained language which might have allowed some latitude in construction; yet when a new enterprise was attempted, such new endeavor was beyond the legislative contemplation when the district was empowered by the special legislative acts. So the holding of this Court in the Berry-Cousart case required that a special district, if it undertakes a new project, should do so under the general law. We do not impair that holding. On the contrary, we emphasize that if a Special District, even in routine matters of its continued existence, should proceed under the general law, all such actions would be valid because they would possess not only the affirmative actions of the commissioners (as required

[2] In *McLeod* v. *Dilworth*, 205 Ark. 780, 171 S. W. 2d 62, we said: "We point this out so that the *dicta* in one decision will not be seized upon as the *ratio decidendi* in the next decision; . . ."

under the special law), but also the action of the County Court (required under the general law).

In the case at bar the appellee district is not undertaking a new project, but is merely cleaning out its drainage ditches as originally constructed. We hold that the case at bar is distinguished on its facts from the Berry-Cousart case. We hold that the appellee district, under its powers in its special acts, may collect any unused assessments for cleaning out the ditches originally constructed. The cases of *Indian Bayou Drainage Dist.* v. *Dickie,* 177 Ark. 728, 7 S. W. 2d 794; *Cox* v. *Drainage Dist.,* 208 Ark. 775, 187 S. W. 2d 887; and *Walker* v. *Roland Drainage Dist.,* 212 Ark. 633, 207 S. W. 2d 319 are not in point here, because in each of those cases the District had been organized under the general law.

The decree of the Chancery Court is in all things affirmed.

Justices HOLT and GEORGE ROSE SMITH dissent.

GEORGE ROSE SMITH, J., dissenting. It seems to me that our only choice is to follow the *Berry* case or to overrule it. There the special act directed the drainage district to construct a new canal and specified the manner in which the district might annex territory benefited by this new improvement. The district attempted to proceed under its special acts, but the court held that the 1927 statute required the district to follow the general drainage law. That Act was held to deprive special act districts of any powers inconsistent with the general law.

So here, the general statute permits the levy of a tax for maintenance of the type contemplated by appellee. It requires, however, that the commissioners give public notice of their intention to apply to the county court for an order levying the tax and permits interested landowners to appear and object. Ark. Stats. (1947), § 21-533. The special act is wholly inconsistent with the general law; it authorizes the commissioners themselves to levy the tax, without notice or court order. The holding in the *Berry* case therefore demands that the district pursue the general law.

The majority draw a distinction between maintenance and new work, but this distinction does not seem to be supported either by the statutes or by any reason of public policy. The 1927 statute does not contain a word to indicate that the lawmakers had any such distinction in mind when the Act was drawn. As a matter of policy, there is much to be said for the result reached in the *Berry* case, by which all drainage districts are brought under a uniform system of law. In this particular case, it would certainly be desirable to give the landowners an opportunity to protest additional taxes which they may have to pay annually for the rest of their lives. For these reasons Justice HOLT and I are unable to concur in the majority opinion.

HARRIS *v.* BLACKBURN.

4-8840 219 S. W. 2d 922

Opinion delivered April 25, 1949.

Rehearing denied May 23, 1949.

House, Moses & Holmes and *William H. Clark,* for appellant.

Burke, Moore & Burke, for appellee.

GRIFFIN SMITH, Chief Justice. Harris and those associated with him in this appeal own land in White River Drainage District of Phillips and Desha Counties. Blackburn is one of the District's three Commissioners. All were made defendants in a suit by landowners who claimed assessments were rendered invalid when original plans were changed; that reassessments were necessary, and that refunds should be made. There were charges, including a failure to publish financial statements.[1]

The Districts as organized in May 1919, under Act 279 of May 27, 1909, as amended, proposed to reclaim more than 169,000 acres, principally in Phillips County in the White River Backwater Area. Intention was to build levees, flood gates, pumping stations, dig drainage ditches, and, generally to make the lands available for cultivation. An example of the impaired condition of some tracts is found in the testimony of Lee Clements who said that in 1933 he bought from the owner 3,600 acres for $240.[2] However, he had an option on

A survey by consulting engineers was filed in October, 1921. The estimated cost was $4,627,265, about $28 per acre. The Commissioners and landowners thought the investment was too great, a view shared by the consultants, who recommended that an attempt be made to procure Federal assistance. In the meantime substantial obligations had been incurred for preliminary work, including the survey. Upon representa-

[1] The other Commissioners were R. S. Bronaugh and E. T. Horner.

[2] The lands were charged with delinquent taxes.

more than 20,000 acres at $1 per acre.

tion to Phillips Circuit Court that $25,000 in certificates of indebtedness were outstanding, and that orderly procedure required additional funds,—some to repay landowners for approximately $100,000 they had advanced,—an assessment of benefits filed in May 1922 was confirmed in August. With approval of assessments the Commissioners reported on negotiations for Federal aid, but said it would be necessary to levy taxes for 1923 and 1924 to pay commitments. These representations resulted in a levy of three-fourths of one percent of the assessed benefits, collectible in 1923 and 1924.

Up to this time there was no suggestion of discontent by any landowner. A seven-page stipulation shows virtual unanimity of purpose; and seemingly the delay now complained of was by common consent, based upon hope that Government grants, or independent levee work for which the District would not be bound, might lift enough of the burden to justify the project. In this situation the Commissioners appealed to Maj. Donald H. Connolly, District Engineer at Memphis, who in April 1925 reported to the Mississippi River Commission, and to the Chief of Engineers of the U. S. Army.

The Overton Flood Control Act under which partial relief was finally procured became a law in 1936. Title 33, § 702 J-2, U.S.C.A., specifically refers to the Tributary Levee Location Survey, White River Levee District. Under this plan levee construction was authorized, with express limitations like those mentioned in *Lessenberry* v. *Little Rock-Pulaski Drainage District No. 2,* 211 Ark. 1046, 204 S. W. 2d 554, second footnote.

Appellants say that "after the project was abandoned" the Government constructed a levee along the left bank of White River—western boundary of the District; but neither the evidence nor the agreed statement justifies a finding that abandonment had occurred. After mentioning the indebtedness with which the District was faced in 1922, a stipulation is that ". . . for a period of fourteen years—from 1922 to 1936—the Commissioners, engineers, and attorneys [waged] a

concerted and continuous effort to obtain Government assistance to carry out the proposed improvements . . .''[3]

A further agreement is that in complying with the Overton Act, ''. . . it became necessary for each landowner to execute an agreement with the District in the nature of an easement across each tract, to the end that the District could be in a position to comply with the terms of the Act of Congress.'' As a result, ''from time to time'' during 1937 and 1938, contracts were executed ''by each and all of said landowners, including the plaintiffs herein and their predecessors in title.'' All conveyances made subsequent to the execution of these papers were subject to terms of the grants, deeds having been duly recorded. Large sums of money were spent by the District to meet Government requirements; and, according to the stipulation, more than 37 miles of drainage canals and diversion channels were constructed under agreement with the Government and in compliance with the Overton Act pertaining to ''interior'' drainage.

In August of 1942 Circuit Court approved a bond issue of $150,000 against assessed benefits of $7,500,000. The order contained a recital that ''. . . when additional work can be carried on, (weather and war conditions permitting) the District will be authorized . . . to borrow additional funds.'' Jurisdiction was retained ''. . . to make other orders . . . as funds may be needed . . . to carry on the drainage and flood control for which the District was organized.''

November 21, 1942, Blackburn, as Chairman of the Board, addressed a communication to landowners in which he said that in dealing with the comprehensive problems involved ''. . . your Commissioners feel

[3] Continuing, the agreed statement says: "During this period [from 1922 to 1936] the Board of Commissioners, the District's agents and employees, attended practically every Flood Control hearing in the House of Representatives and of the Senate of the United States to urge Congress to enact the necessary legislation whereby Federal assistance could be given to carry out the proposed improvements; that the efforts of the Board of Commissioners, its agents and employees, finally successfully culminated in the passage of the Overton Flood Control Act, . . ."

that they should have the advice and suggestions of the property owners who are vitally affected, and to this end we have called a meeting so these questions may be discussed." The meeting was held November 25th. Those who attended were informed that they were to consider policies to be adopted by the Board ". . . in carrying out the over-all drainage program which has been designed, and for which the District has been organized." E. G. Green, the District's engineer, in estimating that "something in the neighborhood" of $200,000 would be required to complete the program, exhibited maps showing drainage canals that were to be constructed. He mentioned that dirt work was costing eight cents a cubic yard, and grubbing three cents—a total of eleven cents per cubic yard. The current tax rate of one-half of one percent yeilded $35,000 annually, an amount "wholly insufficient to carry out the program." However, if with approval of landowners the levy were increased by 25 per cent, ". . . then the work could easily be carried out over a period of years on short-term paper, with borrowings from local banks at very reasonable rates of interest."

The minutes show that in response to these proposals Warfield Rogers, while stressing "the dire need of an adequate drainage system," expressed the view that "this is not the time to carry on the work." The eight-cent price for excavation, he said, was too high. He thought that "after the war" dirt could be removed for not more than four cents, and others agreed with the estimate. Result of the discussions was that, with two exceptions, all voted to discontinue the work ". . . until some future date when it can be done at a cheaper price."

The landowners have appealed from an order sustaining a defense demurrer to all allegations of the complaint except those charging material changes in the plans and the prayer for damages resulting from improvident construction, inexcusable delays, etc. They attack the decree of dismissal from four angles: (1) Original plans were changed in material respects, rendering the assessment of benefits invalid. (2) Benefit

assessments should have been revised when the Federal Government paid the cost of constructing a main levee. (3) "Piecemeal" construction, and taxes levied for the purpose, are illegal. (4) the complaint stated a cause of action in Chancery.

First—Plans Not Substantially Changed.—Appellants are in an anomalous situation in urging that an original plan was altered to their damage when the Government stepped in with five or six million dollars to pay for an indispensable part of the undertaking they first thought would become a charge upon the lands. While admitting changes as the work progressed —some due to the Government's determination that levees should be built at a particular place—the District insists that, in the main, the work has followed the general outline drafted by Harrington, Howard & Ash in 1921. The fourteen-year delay between 1922 and 1936 is shown to have been solicited by landowners who continued to hope during a term partly within the depression period that supplemental assistance would make it possible for the undertaking to be completed as at first conceived.

It is stipulated that none of the appellants excepted to benefit assessments, nor did predecessors in title; and it is undisputed that the law was tracked when the assessments were made. On the face of the record all court orders under which the District was formed, assessments made, or taxes levied, are regular. The attack is therefore an effort to collaterally reach judgments that became final many years ago, and it must fail. *Main* v. *Drainage District No. 2 of Monroe County,* 204 Ark. 506, 162 S. W. 2d 901.

In the forefront of assigned grounds justifying relief are appellants' assertions that construction work was started in the northern or "higher" part of the District; that a borrow pit left by the Government in building the levee serves as a catch-basin; that drainage from north to south causes water to cover lands otherwise free from minor overflows, and instead of being benefited they were actually damaged. But Harris, one of the appellants, admitted on cross-examination that in

respect of the land he owned, nothing could be done without a levee: "Definitely, I am more fortunate because of Government construction . . . than I would have been if compelled to pay for it myself."

If in building a levee plans are materially changed, landowners are not without redress. It is given by statute. (Pope's Digest, § 4476, Ark. Stats. (1947), § 21-517—. There is no contention here that the statutory remedy was invoked. On the contrary, insistence is that appellants are mistaken when they assert that the major plans were departed from. The remedy is mentioned merely to stress the legislative policy of permitting a departure from primary plans and relegating injured persons to compensation as for damages. The section clearly discloses a belief by the lawmakers that a district, once created, should not have its credit impaired, or interests of non-complaining landowners adversely affected, by minority dissents, once the undertaking is definitely launched. Rights given landowners were discussed in an opinion by Judge HART, who said that if, by reason of any change in plans of a drainage district, an assessment become inequitable, the aggrieved person may petition the county court for a reassessment; and, in the absence of fraud, this right precludes resort to equity, and is exclusive. *Hudson* v. *Simonson,* 170 Ark. 243, 279 S. W. 780.

Second—Necessity for Revising Assessments.—The appealing landowners urge with considerable force that a reassessment became imperative when the Government "stepped in" and relieved the District to the extent heretofore shown. This would be true if building the levee constituted such a radical change in plans that a materially different undertaking resulted. Answer comes from most of the witnesses, who in discussing the conceptions of 1919-21, testified that a primary levee was required. It was projected under the Connolly plan, so named because of Connolly's coöperative work. Appellees' engineer testified that this plan afforded better protection than the one suggested by Harrington, Howard & Ash. The witness affirmed the District's purpose to first determine the maximum

volume of water, what facilities would be required to effectively deal with it, and an intent to proceed to completion without material deviation from the original scheme.

Levee construction had not been finished when the case was tried. E. G. Green, engineer, testified that slightly more than four miles were yet to be built around the southern end of Old Town Lake, ". . . and the other 36 miles of levee still have to be enlarged from 1½ to 3 feet in grade." The District must construct 75 miles of canals. Present tax receipts yield $35,000 annually. From this income rights-of-way must be furnished, flood gates operated, the partial system maintained, and all expenses met.

Third—"Piecemeal" Construction.—The Chancellor's determination that a preponderance of the evidence did not show the work to have been done in such a disconnected way as to prejudice rights of the appellants must be sustained. Minutes of meetings held by the Board were not successfully impeached. They show that the fourteen-year delay was a groping period during which the landowners, if not actually seeking delays, impliedly consented to the inactivity. They were unwilling to abandon the project, so kept the District intact as a legal entity in the hope that Federal help would come. Speculative values of the lands were tied to drainage. Without it most of the acreage was worth little more than timber stumpage, and much was not accessible to roads.

Fourth—Did the Complaint State a Cause of Action?—It is not affirmatviely charged that the Commissioners acted fraudulently. Unless this implication necessarily arises from allegations that in spite of assurances work would be pushed as expeditiously as practicable there were mental reservations that it would be unreasonably delayed, a court of equity should not interfere. As a Board, the Commissioners acted under legal authority, and their discretion will not be infringed. It appears, however, that action on the demurrer has become unimportant. Wide range taken by the

testimony touched most issues in the complaint, and brought to the trial Court's attention the material points of controversy.

If full effect be given to apparent purposes of those who attended the November meeting in 1942, two Commissioners who are appellees here were the only attending landowners not willing to delay the work. The Overton Flood Control Act, with its authorization for levee work, had been in effect for more than six years, and the property owners knew then that Federal money was being spent in their behalf. In 1937 and 1938 these men conveyed easements, thereby arraying themselves with the Commissioners in assuring the Government that "drainage facilities made necessary by construction of the levee" would be provided; that the District would acquire and provide without cost to the United States "all flowage and storage rights and easements over, upon, and across the lands and properties within the protected area", etc. Certainly the Government was dealing with the District and with the landowners upon the basis of a definite improvement, to be completed according to plans.

The stipulation is explicit in saying that easement contracts were executed "by each and all of said landowners, *including the plaintiffs herein and their predecessors in title*". Pope's Digest, § 4492, Ark. Stats. (1947), § 21-562, permits property owners in a drainage district to waive the right to resort to courts, and allows them to ". . . absolutely ratify and confirm what has been done by the Board of Commissioners and all other officials with reference to the district". Thereafter they are "forever barred from testing or contesting in [any] way the validity of the proceedings up to that time, the assessments made, or the tax levied for the payment of principle and interest of bonds, or for any other purpose".

The stipulation had the effect of bringing appellants within the terms of the Act when each executed the easement contract, for the implied assurance was that the District existed as a legal entity.

Affirmed.

HINTON *v.* WILLARD.

4-8809, 4-8810, consolidated. 220 S. W. 2d 423

Opinion delivered May 2, 1949.

Rehearing denied June 6, 1949.

Claude Williams and *Vol T. Lindsey,* for appellant.

Hill, Fitzhugh & Brizzolaro and *J. Wesley Sampier,* for appellee.

Ed. F. McFaddin, Justice. Appellants challenge a decree of the Benton Chancery Court, and also a decree of the Washington Chancery Court (both rendered on the same evidence), in each of which decrees the Courts set aside as fraudulent certain conveyances and transactions between the appellants (defendants), and subjected properties in Benton and Washington Counties to the lien of the judgment which the appellees * (plaintiffs) hold against appellant, W. L. Hinton. The record presented is voluminous. The two transcripts exceed 620 typewritten pages; and the abstracts and briefs exceed 450 printed pages. For convenience, we will refer to the parties as they were styled in the lower courts; and will detail the facts and discuss the issues in the following topic headings.

I. *The Judgment Rendered by the Sebastian Chancery Court and now Sought to be Enforced by the Plaintiffs.* For approximately ten years W. L. Hinton was secretary and manager of the Mutual Savings Building

* The Mutual Savings Building & Loan Association, as assignor of the Sebastian Chancery Court judgment, was listed as a party plaintiff and appellee. Clyde B. Willard, one of the plaintiffs, died pending the present litigation, and the cause as to him was revived in the name of his executrix. For clarity in detailing the facts in this opinion, we have styled the appellees as "Clyde B. Willard, *et al.*"

& Loan Association of Fort Smith (hereinafter called "Association."). He resigned in 1938, and the Association sued him for an accounting, in the Sebastian Chancery Court. A master was appointed and considerable evidence was taken—all of which is in the record in the present cases. Hinton voluntarily conveyed to the Association certain properties; but even after these conveyances, a decree was entered: (1) returning title from Hinton to the Association to other properties, and (2) awarding the Association a personal judgment against W. L. Hinton for $12,643.27 with interest at 6% until paid. This money judgment was rendered on October 10, 1939, and is the one which the plaintiffs are now seeking to enforce. The only credits on the judgment are: $179.17 on April 9, 1940, and $300 on January 7, 1941.

The judgment was assigned to C. B. Willard and A. F. Hoge, who—along with Hinton—had been officers in the Association. By proper writs of *scire facias* and orders of revivor (§§ 8271-77, Pope's Digest),[1] the judg- February 27, 1945, and, again, on February 24, 1948. In each of these instances, the writ of *scire facias* was duly served on W. L. Hinton, and also the order of revivor recites the assignment of the judgment by the Association to Willard and Hoge, and the two payments credited thereon as previously mentioned.

One of Hinton's main contentions in the present suits is that these orders of revivor are not *res judicata* against him, and that he is entitled to cross complain against the plaintiffs, Willard and Hoge, in these suits and compel them to account to him now for all of their actions in the liquidation of the Association. Hinton claims (1) that Willard and Hoge, as directors of the Association, were trustees;[2] (2) that Willard and Hoge, in winding up the affairs of the Association after Hin-

[1] Sections 29-601 to 29-607, inclusive, Ark. Stat. (1947).

ment was revived by Willard and Hoge, as assignees, on

[2] Citing *Hornor* v. *New South Oil Mill,* 130 Ark. 551, 197 S. W. 1163, and *Nedry* v. *Vaile,* 109 Ark. 584, 160 S. W. 880.

ton left, were guilty of neglect as trustees;[3] and (3) that the judgments of revivor in the scire facias actions were not *res judicata* against the cross complaint of Hinton.[4]

We hold against Hinton on the third contention (i. e., *res judicata*), and such holding makes it unnecessary to discuss the other two. From 1939 until 1948 Hinton seemed absolutely indifferent to the affairs of the Association. He moved from Fort Smith to northwest Arkansas, and went into the winery business. Willard and Hoge, as the remaining officers of the Association, were left "with the bag to hold." By borrowing large sums on their own financial standing, they satisfied creditors and other stockholders; and, in order to salvage what they could to apply on their own losses, they took the assignment of the Hinton judgment from the Association. The Association was liquidated, its charter surrendered, and Willard and Hoge revived the judgment as previously recited. If Hinton had desired to question the validity of the assignment of the judgment from the Association to Willard and Hoge, or had wanted to claim on the judgment any *bona fide* credits due him by the Association or by Willard and Hoge, then in any such event, Hinton should have offered such defenses when the writs of *scire facias* were served on him, and before the judgments of revivor were entered.

The purpose of a revivor of a judgment by *scire facias* is to continue the lien of the judgment by the holder thereof for the amount due, less credits. So. ownership of the judgment and the extent of the credits are matters necessarily within the scope of defense in the proceedings to revive by *scire facias*. In Ward v. Sturdivant, 96 Ark. 434, 132 S. W. 204 Mr. Justice FRAUENTHAL, speaking for this Court, said—concerning the force and effect of a judgment of revivor based on a writ of *scire facias*:

"That judgment was rendered in a proceeding by scire facias, and, after its rendition, it became as effective

[3] Citing *Clark* v. *Spanley*, 122 Ark. 366, 183 S. W. 964, and *Spradling* v. *Spradling*, 101 Ark. 451, 142 S. W. 848.

[4] Citing, *inter alia*, *Biederman* v. *Parker*, 105 Ark. 86, 150 S. W. 397; *Ellis* v. *Caruthers*, 137 Ark. 134, 208 S. W. 425; *Fawcett* v. *Rhyne*, 187 Ark. 940, 63 S. W. 2d 349, and *Lilly* v. *Verser*, 133 Ark. 547, 203 S. W. 31.

as an adjudication as other judgments. In a proceeding to revive a judgment by scire facias the defendant is bound to plead all matters of defense that he has, just as he would in an ordinary suit. The judgment of revival is conclusive against all facts and defenses which existed before its rendition. In 2 Freeman on Judgments, § 448, it is said: "The effect of a judgment entered upon a scire facias as an adjudication does not differ from that of other judgments. It cannot be collaterally avoided for mere error or irregularity, and, until set aside by some proper proceeding, it conclusively establishes the facts necessary to support it as against all persons properly made parties thereto.' Helms v. Marshall, 121 Ga. 769, 49 S. E. 733; Babb v. Sullivan, 43 S. C. 436, 21 S. E. 277; Witherspoon v. Twitty, 43 S. C. 348, 21 S. E. 256."

In Ward v. Sturdivant, *supra,* it was attempted in a subsequent proceeding to raise the issue of defect of parties in the order of revivor, and this Court said: "But, having failed to raise any objection to the party in whose name the judgment of revivor was rendered, the parties are now concluded thereby; . . ."

Holdings in other jurisdictions are in accord with the Arkansas holdings as to the effect of the writ of *scire facias* and the order of revivor. See 47 Am. Juris. 482.

We therefore conclude that when the defendant—by offering no defense to the writs of *scire facias* and by allowing the Sebastian Chancery Court to enter the uncontested orders of revivor in 1945 and 1948—is bound by the rules of *res judicata,* and cannot be heard in the present suits to say either that Willard and Hoge are not the owners of the judgment, or that Hinton is entitled to credits (other than the two entered on the judgment) for any matters prior to the 1948 order of revivor.

II. *W. L. Hinton's Ownership of the Winery and the Other Properties in Washington and Benton Counties.* On October 6, 1939, (four days before the Sebastian Chancery Court judgment was rendered) Hinton and his wife and daughter (all of whom are defendants) signed and placed of record a limited partnership agree-

ment for the ownership and operation of "The W. L. Hinton Winery." This instrument recited the interest of the parties to be: 98% to Mrs. Hinton and the daughter, and 2% to W. L. Hinton. Furthermore, after 1939, title to various tracts of property in Washington and Benton Counties was taken either in the name of the winery or in the name of Mrs. W. L. Hinton. In these suits the plaintiffs seek to enforce the lien of their judgment not only against the winery, but also against the other property held in the name of Mrs. Hinton. The plaintiffs claim that all of these transactions were fraudulent as against the judgment rendered against Hinton in favor of the Association in 1939.

It was conceded in the evidence—in fact, Mrs. Hinton so testified—that Mr. Hinton was insolvent when he moved from Fort Smith. Our cases hold that when an insolvent debtor deals with the members of his family, such transactions are to be closely scrutinized to determine whether they were to evade the payment of the debts of the insolvent. See Quisenberry v. Davis, 136 Ark. 115, 206 S. W. 139; Brady v. Irby, 101 Ark. 573, 142 S. W. 1124, Ann. Cas. 1913E, 1054; Driggs v. Norwood, 50 Ark. 42, 6 S. W. 323, 7 Am. St. Rep. 78, and other cases collected in West's Arkansas Digest, "Fraudulent Conveyances," § 104.

The evidence on this fraudulent conveyance phase of the case is as voluminous as that on the other topic previously mentioned, but it was shown that W. L. Hinton was in every respect the moving spirit and controller of the destinies of the winery. There was some effort to show that Mrs. Hinton had obtained some money from her father's estate that went into the enterprise; but from a full review of the entire evidence—which we do not lengthen this opinion by detailing—we conclude that this limited partnership agreement was a badge of fraud conceived and executed by W. L. Hinton in his scheme to place his property beyond the reach of the judgment that he is here seeking to defeat. Likewise, we conclude that the title to the various tracts of property in Washington and Benton Counties taken in the name of Mrs. W. L. Hinton was really owned by

W. L. Hinton, and the properties are subject to the lien of the plaintiff's judgment. The Chancery Courts so found, and we affirm such portion of the decrees.

III. *Defendant's Claim of Homestead Rights in Washington County.* Mr. and Mrs. W. L. Hinton claimed that they had acquired the right of homestead in certain property in Washington County. Our cases on homestead hold that there must be the intent to occupy in good faith, as well as the actual occupancy in good faith, before the homestead right attaches against pre-existing creditors. See Gibbs v. Adams, 76 Ark. 575, 89 S. W. 1008; Chastain v. Arkansas Bank & Trust Co., 157 Ark. 423, 249 S. W. 1; Bank of Quitman v. Mahar, 193 Ark. 1111, 104 S. W. 2d 800; Shell v. Young, 78 Ark. 479, 95 S. W. 798; Gebhart v. Merchant, 84 Ark. 359, 105 S. W. 1034; and other cases collected in West's Arkansas Digest, "Homestead," §§ 31-35, inclusive.

Among other salient facts, it was shown that Mr. and Mrs. Hinton made only sporadic visits to the Washington County property; that they spent most of their time in Benton County; and that both of them had voted in the election in Benton County. We therefore affirm the decree of the Chancery Court, which denied the Hintons the claimed homestead rights in the property in Washington County.

IV. *Mrs. Hinton's Rights to the Proceeds of the Sale of the Sebastian County Homestead.* On this one point we hold with the appellants. When the Association obtained its judgment in 1939 the Hintons had a homestead in Sebastian County. On January 7, 1941, for a consideration of $300, the Association released the lien of its judgment on the property that was or had been the homestead of the Hintons in Sebastian County; and the release of the lien on this particularly described property was endorsed on the margin of the record where the judgment was recorded. After such release the Sebastian County homestead property was sold by Mr. and Mrs. Hinton, and she has in cash the proceeds of that sale, which amounted to several thousand dollars.

The Chancery Courts, in the decrees from which come these appeals, held that this sale and delivery of the money to Mrs. Hinton "was for the purpose of defeating these plaintiffs in their rights as judgment creditors," and ordered all of such money in the hands of Mrs. Hinton to be held to apply on the plaintiff's judgment. The plaintiffs seek to defend this portion of the decree by citing such cases as Tucker v. Stell, 169 Ark. 1, 272 S. W. 864, in which it is stated that the proceeds from the sale of the homestead, if not reinvested in another homestead, become personal property and lose the immunity of homestead exemption. Of course, the judgment lien could not have been enforced against the property as long as it remained homestead, and was claimed as such, but the holding in Tucker v. Snell, *supra,* is not applicable here. The Association, for a valuable consideration, released the lien of its judgment on this Sebastian County property, and thereby enabled Hinton to sell the property free of any subsequent attempt of the judgment creditor to seize the released property. Hinton and wife did sell the property, and he gave her his part of the money from the sale.

We conclude that, by receiving the said $300 and contractually releasing the lien of its judgment on the specific property, the Association and the plaintiffs herein (as its assignees) are estopped to claim any lien on the proceeds of the sale of the Sebastian County homestead. So we hold that the money held by Mrs. Hinton, and conceded by all parties to be the proceeds of the sale of the property on which the lien had been released, is exempt from seizure in this fraudulent conveyance suit.

We therefore reverse only those portions of the decrees, here appealed from, which concern the money in Mrs. Hinton's hands admitted to have been received by her from the sale of the Sebastian County homestead. In all other respects the decrees are affirmed, and all costs are assessed against the defendants.

McFaddin, J. (on rehearing). Appellants ask us to incorporate in our opinion a finding that appellees neither have nor claim any interest in certain property in Sebastian county which W. L. Hinton conveyed to Grace Nowlin, trustee. Even though the appellees are willing to stipulate to such effect, nevertheless, we decline to make such finding, because title to this Sebastian county real estate was not adjudicated in these two cases. If appellants desire to determine title to such Sebastian county real estate, then better practice would be to proceed in that venue.

The petition for rehearing is denied in all respects.

Alstadt, Mayor *v.* Arkansas-Missouri Power Company.

4-8873 219 S. W. 2d 938

Opinion delivered May 2, 1949.

Arthur Sneed, T. A. French and *E. G. Ward,* for appellant.

Harry L. Ponder, for appellee.

ED. F. MCFADDIN, Justice. This is an appeal by the City of Rector and its officials from a chancery decree holding void ordinance No. 223 of said city. The ordinance reads:

"AN ORDINANCE FOR THE REGULATION AND INSPECTION OF ELECTRIC LIGHT, POWER, TELEPHONE AND TELEGRAPH POLES WITHIN THE CITY OF RECTOR, ARKANSAS, AND PROVIDING A LICENSE FEE THEREFOR, FOR THE PURPOSE OF RAISING REVENUE TO DEFRAY THE EXPENSE OF SUCH REGULATION AND INSPECTION: FIXING THE TIME OF THE PAYMENT OF SAME AND PROVIDING PENALTIES FOR THE VIOLATION THEREOF:

"Whereas, the City of Rector, Arkansas, finds it necessary to regulate and inspect electric light, power telephone and telegraph poles located in streets, alleys or public grounds, and finds it necessary that a small license be charged for such regulation inspection;

"THEREFORE, BE IT ORDAINED BY THE COUNCIL OF THE CITY OF RECTOR, ARKANSAS:

"SECTION ONE: That from and after the passage, and approval and publication of this ordinance there is hereby levied for the purpose of regulation and inspection, a license fee of ten cents per month on each pole kept, maintained or used in place on the streets, alleys or other public place (except poles specified in litigation) in said city, and each person, firm, partnership or corporation using or maintaining electric light, power, telegraph or telephone poles, as aforesaid, shall pay monthly into the treasury of said city ten cents for each pole maintained, kept or used, and all money arising from said payments shall be used to defray the expenses of inspection and regulation of such poles and for no other purpose, provided the license fee for remainder of the month shall be prorated.

"SECTION TWO: That the license fee herein levied shall be due and payable on the first day of each month hereafter, and any person, firm, partnership or corporation, their agent, representative or manager who shall fail or refuse to pay the license fee herein levied, within ten days after the due date thereof, shall be deemed guilty of a misdemeanor, and upon conviction shall be fined in any sum not to exceed $25.00, and each day that any such person, firm, partnership or corporation, their agent, representative or manager, shall fail to pay such license fee shall constitute a separate offense, and moreover, the amount of such license fee may be recovered in a civil action in any court having competent jurisdiction.

"SECTION THREE: It is hereby made the duty of the City Marshal to make inspection as often as deemed necessary, of all poles, wires and conduits (except poles specified in litigation) and ascertain whether their condition is dangerous to the lives, limbs, health, comfort or quiet of the public, or dangerous to the safety of property, and report the result of such inspection to the Mayor of said City.

"SECTION FOUR: That all ordinances, or parts of ordinances in conflict herewith are hereby repealed, and it being necessary for the public health and safety of said city that this ordinance take effect and be in force at once, an emergency is hereby declared and this ordinance shall take effect and be in full force from and after its passage, approval and publication."

The appellee, Arkansas-Missouri Power Company, is a public utility serving the City of Rector; and brought this suit in equity against the appellants (defendants below), being the City of Rector and its mayor and other officials, to enjoin the enforcement of the ordinance No. 223. The complaint alleged, *inter alia:* "That said ordinance is void and unenforceable because it undertakes to evade the law and provides a li-

cense fee for the inspection of certain poles, and that the same is unfair, unjust and arbitrarily fixed, and is not for the purpose of inspection of the poles of plaintiff, but is for the purpose as stated in the preamble of said ordinance, 'for the purpose of raising revenue' only. Said ordinance is void for the reason that the fee charged is exorbitant, and it is apparent from the face of the ordinance that the same was passed for the purpose of producing revenue, which purpose is without authority of law, and for which reason the ordinance is void."

The appellees (defendants) by answer admitted the passage of the ordinance, but denied all other allegations of the complaint. Without requiring the introduction of any evidence, the Chancery Court held the ordinance to be void, and perpetually enjoined its enforcement.

The decree of the Chancery Court should be reversed. We have repeatedly held that under its police powers a municipality may levy a tax on poles, with the proceeds of the tax to defray the expense incurred by the city in inspecting the poles and wires for the safety of the public. See Fort Smith v. Hunt, 72 Ark. 556, 82 S. W. 163, 66 L. R. A. 238, 105 Am. St. Rep. 51, and Ark. Public Utilities Co. v. Heber Springs, 151 Ark. 249, 235 S. W. 999. The ordinance here under attack proposes to act within such police power. Of course, under the guise of an inspection fee, a municipality cannot camouflage a revenue measure. In City of Fayetteville v. Carter, 52 Ark. 301, 12 S. W. 573, 6 L. R. A. 509, Mr. Justice Battle stated the rule in this language:

"The power to license and regulate granted by the statute was conferred solely for police purposes; and municipal corporations have no right to use it as a means of increasing their revenues. They can require a reasonable fee to be paid for such a license. The amount they have a right to demand for such fee depends upon the extent and expense of the municipal supervision made necessary by the business in the city or town where it is licensed. A fee sufficient to cover the expense of issuing the license, and to pay the expenses which may

be incurred in the enforcement of such police inspection or superintendence as may be lawfully exercised over the business, may be required. It is obvious that the actual amount necessary to meet such expenses cannot, in all cases, be ascertained in advance, and that 'it would be futile to require anything of the kind.' The result is, if the fee required is not plainly unreasonable, the courts ought not to interfere with the discretion exercised by the council in fixing it; and unless the contrary appears on the face of the ordinance requiring it, or is established by proper evidence, they should presume it to be reasonable.''

In the case at bar there was no testimony offered, so there is no evidence to support the chancery decree which found the ordinance to be void. It is not void on its face, since—as heretofore stated—the city possesses the power to enact such an ordinance, and there was no showing that the ordinance was other than a police measure. We reverse the decree and remand the cause to the Chancery Court, with directions to dissolve the injunction; and also to dismiss the complaint, unless plaintiff elects to offer proof, in which event the defendants will of course be allowed to offer such evidence as they desire, and a decree may then be rendered in regular course.

POPE *v.* STATE.

4556 219 S. W. 2d 940

Opinion delivered May 2, 1949.

[redacted]

Adams & Willemin, for appellant.

Ike Murry, Attorney General and *Robert Downie,* Assistant Attorney General, for appellee.

ROBINS, J. Appellant was indicted by the grand jury for the offense of keeping a gambling house (in violation of §§ 41-2001-4, Ark. Stats. (1947). It was alleged in the indictment that appellant "on the 1st day of March, 1948, did unlawfully, wilfully, knowingly and feloniously keep, conduct, operate and have an interest in the conduct of and operation of a gambling house commonly known as "Joe Buck's Place" on the Paragould Highway near Jonesboro, wherein gambling was conducted and gaming devices exhibited. . . ."

A jury found him guilty of operating a gambling house and fixed his punishment at imprisonment in the penitentiary for one year; and from judgment in accordance with the verdict this appeal is prosecuted.

For reversal it is argued that the testimony was not sufficient to support the verdict, and that the lower court erred to the prejudice of appellant in refusing to submit to the jury the misdemeanor charge (setting up gaming devices in violation of Ark. Stats. (1947), §§ 41-2003 and 41-2004), which offense appellant insists was embraced in the indictment.

There was abundant evidence to establish appellant's guilt. It was shown without contradiction that the property described in the indictment was owned by appellant and Joe Buchanan; that it was fitted up as a gambling house with tables, paraphernalia, etc., ordinarily found in such a place, that it was operated as a gambling house and that appellant assisted in the operation thereof. The utility bills for the gambling house apparently were charged to and paid by appellant. Appellant did not testify. Under the proof the jury could hardly have found other than that appellant was an active partner in the enterprise.

The lower court did not err in refusing to instruct the jury on the misdemeanor charge.

The record before us shows that the grand jury returned a separate indictment against appellant on the misdemeanor charge of setting up gaming devices. The two indictments had not been consolidated, but remained separate cases on the docket. Appellant went to trial, without any objection, on the felony charge. Under the circumstances the lower court did not err in making the instructions conform to the indictment and the proof.

Affirmed.

WALSH *v.* FAIRHEAD, EXECUTRIX.

4-8804 219 S. W. 2d 941

Opinion delivered May 2, 1949.

Frank C. Douglas, Clair McTurnan and *Alembert W. Brayton, III,* for appellant.

Sloan & Sloan, for appellee.

MINOR W. MILLWEE, Justice. This is a contest of the last will of Maurice P. Welsh who was a resident of Jonesboro, Arkansas, for 45 years prior to his death October 4, 1946. Decedent was survived by a daughter, Elizabeth Welsh Knollton of Phoenix, Arizona, and the following nieces and nephews: Margaret Welsh Fairhead of Jonesboro and William Welsh of Indianapolis, Indiana, children of decedent's brother, Michael Welsh; Ann Walsh, Lillian Walsh and Julia Walsh McNutt of Kokomo, Indiana, daughters of decedent's brother, Patrick Walsh; Thomas Kane of San Francisco, California, son of decedent's sister, Nellie Welsh Kane. Margaret Walsh Fairhead has a son, Maurice J. Fairhead who is a grandnephew of decedent and also a resident of Jonesboro. All of decedent's brothers and sisters predeceased him.

The will in question was executed on August 22, 1946, and admitted to probate in common form on October 9, 1946. Appellants, Ann Walsh and William Welsh, filed this action in the probate court against appellee, Margaret Welsh Fairhead as executrix and trustee under the will. The contest is based on allegations of mental incapacity of the testator and undue

influence exercised by "persons who would benefit directly or indirectly" by the alleged will. Appellants also alleged that in 1937 decedent contracted with Patrick Walsh to make testamentary bequests aggregating $10,000 to the latter's three daughters.

Appellee moved to dismiss the petition of appellants asserting that if the 1946 will was held invalid, the estate would go to decedent's daughter and appellants were, therefore, without interest. In response to this motion appellants filed an amendment to their petition alleging that a will, executed by decedent on January 4, 1944, under which appellants would inherit, was the true will and should be produced by said executrix. The response of the executrix denied the allegations of the petition and exhibited an attorney's office copy of the 1944 will.

After an extensive hearing, the probate court found: "That the testator, Maurice P. Welsh, had sufficient mental capacity on August 22, 1946, to make a valid will; that the will being contested was executed on said date; that the evidence does not indicate that there was any fraud or undue influence on the part of anyone in connection with the execution of said will, and petition of petitioners should be dismissed with costs."

Maurice P. Welsh was a native of Indiana. He came to Jonesboro about 1900 and engaged in the operation of a handle factory. He and his wife were separated and their daughter Elizabeth made her home with her mother in Kentucky and Arizona, but frequently spent her vacations with her father at Jonesboro. Decedent lived at a hotel at Jonesboro until 1925 when he built a home. At his request appellee, Margaret Welsh Fairhead, who was divorced, moved with her fifteen year old son from Indiana to Jonesboro to take care of the new home. Mrs. Fairhead was housekeeper for her uncle until his death. Maurice J. Fairhead, her son, also resided in the home and decedent provided liberally for his support and education.

Decedent was a man of superior business ability and had acquired an estate valued at approximately

$180,000 at the time of his death at the age of 76. In 1937, he conveyed the home to Mrs. Fairhead. He also gave her savings bonds of several thousand dollars over a period of years and conveyed certain real estate to her shortly before the execution of the 1946 will. After he moved to Jonesboro, decedent made annual visits to Indiana and his Indiana relatives occasionally visited him at Jonesboro. The expenses of these visits were paid by decedent who also assisted his relatives in medical and other expenses.

The will of August 22, 1946, provided for special bequests as follows: $10,000 to Convent Maria Stein and St. Bernard's Hospital of Jonesboro; $5,000 to Jonesboro Public Library; $100 each to Thomas Kane and the three daughters of Patrick Walsh, deceased; and all decedent's interest in the American Handle Company to his grandnephew, Maurice J. Fairhead. The residue of the estate was placed in trust with decedent's niece, Margaret Fairhead, as trustee at a salary of $150 a month; and the annual net income of said trust was divided three-fourths to appellee, Margaret Fairhead and one-fourth to decedent's daughter, Elizabeth, with certain limitations and exceptions as to the daughter's share. The corpus of the trust estate after the death of the two beneficiaries was given to Convent Maria Stein and St. Bernard's Hospital, unless decedent's daughter left bodily heirs, in which event one-fourth of said corpus passed to such heirs.

The will of January 7, 1944, contained special bequests as follows: "St. Bernard's Hospital, $1,000; William Welsh, $1,000; Thomas Kane, $500. The balance of the estate was given five-eights in fee to appellee, Margaret Fairhead; one-eighth to the three daughters of Patrick Walsh, deceased, and the remainder in trust for the benefit of decedent's daughter, Elizabeth. Both wills contained an *in terrorem* clause which nullified any gift to a beneficiary who contested the will.

Decedent became afflicted with prostatic cancer about 1938 and underwent several operations from 1938

to 1943. Although his condition grew slowly worse, he remained active in the operation of his various enterprises until a few weeks prior to his death in October, 1946. He was hospitalized at different times for the treatment of his affliction and was in the Jonesboro hospital on August 22, 1946, when he executed the will in question. He was discharged from the hospital the last time on August 24, 1946.

In attempting to meet the burden of showing mental incapacity and undue influence appellants offered the testimony of themselves, Lillian Walsh, Margaret Fairhead and Dr. Charles W. Miller, Jr., a psychiatrist. Appellee offered the testimony of decedent's family physician, minister, the attorney for the handle factory, and two of the three witnesses who attested both wills and also a will executed by decedent in 1935. Appellee also offered the evidence of several friends and business associates of decedent.

Appellant, William Welsh, visited his uncle for two weeks in the first part of July, 1946. He stated that he and decedent went on walks and had several conversations during the visit; that decedent would start a conversation while they were in the yard and become seized with pain, go into the house and upon his return, would talk about a different subject. He thought decedent's occasional inability to connect statements was attributable to pain and failing memory. Witness stated that he would sometimes get "half-crocked" when they drank together and forget what decedent told him. He also admitted that decedent's mind was clear when he arranged for the purchase of a set of false teeth and suit for witness and also gave him some cash on this visit.

Appellant, Ann Walsh, testified that she visited decedent from August 28 to September 10, 1946; that decedent was nervous and suffered much pain, but slept most of the time and did not talk much; that she brought a toy playing piano which played a familiar Irish tune which he failed to recognize. She also testified that Maurice J. Fairhead went into decedent's room on one

occasion, lay across the bed and pleaded with decedent about some promise that he had made, and that a few days later the secretary of the handle company and Maurice Fairhead went into decedent's room when presumably decedent transferred a part of the stock of the handle company to Maurice. She also stated that her father used the name "Walsh" because it was more Irish than "Welsh."

Lillian Walsh testified about an alleged dispute between her father, Patrick Walsh, and decedent growing out of the settlement of the estate of their mother who died in Indiana in 1916. She only knew what her father had told her about the dispute. She stated that she visited decedent with her father in 1937 and heard a conversation between her father and decedent in which the latter persuaded the former to undergo an eye operation at Memphis, Tennessee, at decedent's expense; that her father refused to have the operation performed unless decedent also agreed to pay or make a testamentary bequest of $10,000 to Patrick's three daughters in satisfaction of the 1916 dispute; and that the operation was performed after decedent agreed to do so. Decedent had made two loans of $500 each to witness which had not been repaid.

Dr. Charles Miller, Jr., the psychiatrist, explained in detail the hospital records of the decedent. In answer to hypothetical questions based primarily on said records, it was his opinion that decedent was suffering from delirium and did not have the mental capacity to make a will on August 22, 1946. Witness had never seen decedent and did not usually diagnose cases from hospital records only. He admitted that such diagnosis is less satisfactory than actual acquaintance with and observation of the patient.

The evidence on behalf of appellee tended to show that decedent was mentally capable of making the 1946 will and that there was no undue influence exercised upon him. Dr. W. H. Willet, decedent's family physician for 33 years testified that he saw decedent almost daily during the last six months of his life and that

his mind did not become affected until 24 to 48 hours before his death. He stated that decedent's ability to transact business was "very good" on August 22, 1946; that decedent subsequently told him of the charitable bequests he had made in the will, and that his mind was exceptionally clear at that time.

The testimony on behalf of appellee also shows that early in 1946 decedent told his attorney and business associate, who had drafted the 1935 and 1944 wills, that he wanted to change his will; that decedent in June and July, 1946, took an active part in several conferences involving negotiations of a union contract growing out of a labor dispute at the handle factory; that late in July, 1946, his attorney furnished decedent with an office copy of the 1944 will upon which decedent made pencil notations of the changes he desired to make. After this was done the attorney redrafted the will and took it to the hospital where it was read to and approved by decedent on August 21, 1946. At decedent's direction, the attorney returned to the hospital about 8:00 a. m., August 22, 1946, with the three witnesses who had witnessed the former wills, and the will in question was duly executed. The witnesses to the will stated that decedent's mind was clear and that he apologized for inconveniencing them with his affairs. There was no one present except decedent, his attorney and the witnesses. Several other friends and business associates of long standing, including decedent's boyhood friend from Indiana, testified to the mental soundness of the decedent both immediately prior to and after the date of the execution of the 1946 will.

The evidence further discloses that early in 1946 decedent transferred a part of his stock in the handle company to his grandnephew, Maurice J. Fairhead, and made him manager of the factory and that decedent continued to give advice and exercise general supervision over operation of the plant until shortly before his death. It was also shown that decedent and his niece, Margaret Fairhead, were devout members of the Catholic Church while Patrick Walsh had withdrawn there-

from and his daughters were not members of that church.

The recent case of Shippen v. Shippen, 213 Ark. 517, 211 S. W. 2d 433, involved facts somewhat similar to those in the instant case. We there said: "We have often defined mental capacity such as must be possessed by a testator in order for him to make a valid will. The rule has been generally expressed that sound mind and disposing memory, constituting testamentary capacity, is (a) the ability on the part of the testator to retain in memory without prompting the extent and condition of property to be disposed of; (b) to comprehend to whom he is giving it; and (c) to realize the deserts and relations to him of those whom he excludes from his will. Taylor v. McClintock, 87 Ark. 243, 112 S. W. 405; Boone v. Boone, 114 Ark. 69, 169 S. W. 779; Mason v. Bowen, 122 Ark. 407, 183 S. W. 973, Ann. Cas. 1917D, 713; Griffin v. Union Trust Company, 166 Ark. 347, 266 S. W. 289; Puryear v. Puryear, 192 Ark. 692, 94 S. W. 2d 695; Petree v. Petree, 211 Ark. 654, 201 S. W. 2d 1009. And the burden of proof, in cases of this kind, is on the contestant, who asserts the mental incapacity of the testator. McWilliams v. Neill, 202 Ark. 1087, 155 S. W. 2d 344; Parette v. Ivey, 209 Ark. 364, 190 S. W. 2d 441. . .

"Considering the question of undue influence such as invalidates a will, we said in the case of McCulloch v. Campbell, 49 Ark. 367, 5 S. W. 590: 'The influence which the law condemns is not the legitimate influence which springs from natural affection, but the malign influence which results from fear, coercion, or any other cause that deprives the testator of his free agency in the disposition of his property.' "

In the famous case of Taylor v. McClintock, supra, it was held (Headnote 4): "Testators are not required to mete out equal and exact justice to all expectant relations, and the motives of partiality, affection or resentment by which they may be influenced are not reviewable; and if one have the capacity to make a will, he may

make it as eccentric, injudicious and unjust as caprice, frivolity or revenge can dictate."

We also adhere to the rule that the questions of testamentary capacity and undue influence are so interwoven in any case where raised that such questions should be considered together. As the court said in Phillips v. Jones, 179 Ark. 877, 18 S. W. 2d 352: "Where the mind of the testator is strong and alert the facts constituting the undue influence would be required to be far stronger in their tendency to influence the mind unduly than in another, where the mind of the testator was impaired, either by some inherent defect or by the consequences of disease or advancing age. It is clear that feeble intellect will not be of itself sufficient to establish lack of testamentary capacity, for that condition must be so great as to render the testator incapable of appreciating the nature and consequences of his act; but this feebleness may be inferred when, from the facts in proof, it is apparent that he was incapable of appreciating the deserts and relations of those whom he excludes from participating in his estate, although he might have had the ability to retain in memory, without prompting, the extent and condition of his property, and to comprehend to whom he was giving it." See, also, Brown v. Emerson, 205 Ark. 735, 170 S. W. 2d 1019.

Appellants rely very strongly on the Phillips and Brown cases, supra, and also on Boyland v. Boyland, 211 Ark. 925, 203 S. W. 2d 192. It would unduly extend this opinion to recite the difference between the facts of these cases and those in the instant case as pointed out in appellee's brief. This is another case where the trial court, who heard and observed the witnesses testify, is in a much more advantageous position than this court in evaluating evidence. When we apply our well established rules to the evidence here adduced, we conclude that the trial court correctly held that appellants did not discharge the burden resting upon them of showing by a preponderance of the evidence either mental incapacity or undue influence which the law requires before a solemn will may be declared a nullity.

The trial court sustained appellee's objection to the opinion of appellants to the effect that decedent was mentally incapable to make the will in question. We have frequently held that a non-expert witness may testify as to his opinion after stating the facts upon which the opinion is based so that the court may determine the weight to be given such testimony. In Griffin v. Union Trust Company, 166 Ark. 347, 266 S. W. 289, the rule was restated as announced in the early case of Kelly's Heirs v. McGuire, 15 Ark. 555, where the court said: "The value and force of the opinion depends on the general intelligence of the witness, the grounds on which it is based, the opportunities he had for accurate and full observation, and his entire freedom from interest and bias." If such opinion rests upon facts which do not justify it, then it is worthless. Puryear v. Puryear, supra.

We agree that the trial court erred in refusing to permit appellants to state their opinion that the testator was mentally incompetent, but it does not necessarily follow that the cause should for that reason be reversed. We try the case here *de novo* and will only consider the competent testimony regardless of the ruling of the trial court on the challenged evidence. Harrell v. Southwest Mortgage Co., 180 Ark. 620, 22 S. W. 2d 167; Brittian, Adm. v. McKim, 204 Ark. 647, 164 S. W. 435. The same ruling is applicable to the trial court's admission in evidence of a letter from decedent's daughter, Elizabeth, to Ann Walsh admitted upon the latter's cross-examination. The letter had no bearing upon the issues involved and we disregard it entirely in passing on the weight of the evidence. Although we have considered, here, the excluded opinion evidence and have disregarded the contents of the letter, we hold that the judgment of the probate court was, nevertheless, correct.

Appellants also invoke the following rule stated in Smith v. Wheat, 183 Ark. 169, 35 S. W. 2d 335: "Where parties have it in their power to explain suspicious circumstances connected with a transaction, the court trying the case may regard the failure to do so as a proper subject for comment and may regard their fail-

ure to produce evidence within their power as a circumstance against them." The case cited involved a fraudulent conveyance by an embarrassed debtor to a near relative under very suspicious circumstances. Appellants argue that they are non-residents while appellee and other beneficiaries under the will were in Jonesboro, which made it difficult, if not impossible, for appellants to obtain the testimony of local physicians and lay witnesses. Appellants also point out certain inconsistencies in the testimony of witnesses for appellee which they assert could have been cleared up by a more thorough examination of said witnesses or the calling of others by appellee. As previously stated, the burden in the instant case was upon appellants to prove the invalidity of the will. If there were physicians and other witnesses in Jonesboro who were conversant with the facts, they have not been identified by appellants. Nor has it been shown that any such witnesses were less available to appellants than to appellee. Moreover, we do not agree with appellants' contention that the circumstances in the instant case are such as to call for application of the rule relied upon.

The judgment of the probate court is supported by the preponderance of the competent evidence and is, therefore, affirmed.

PLOUGH *v.* PLOUGH.

4-8911 219 S. W. 2d 947

Opinion delivered May 2, 1949.

E. M. Ditmon, for appellant.

GEORGE ROSE SMITH, J. Appellant, a soldier stationed at Camp Chaffee, brought this uncontested action for divorce about two months after his arrival in Arkansas. He admits that his presence in this State is in obedience to army orders and that he may be transferred to a new station at any time. Appellant formerly lived in South Carolina and intends to marry a South Carolina girl if this suit is successful. The appeal is from a dismissal for want of jurisdiction.

We held in *Cassen* v. *Cassen,* 211 Ark. 582, 201 S. W. 2d 585, that our statutory requirement of three months' residence means the same thing as domicile and that the intention to remain in this State must be manifested by overt acts. Here the only testimony of this nature is appellant's statement, "I am figuring on remarrying and making this my home." This bare assertion, unaccompanied by voluntary conduct, fails to establish the element of permanence that distinguishes domicile from simple presence within the jurisdiction.

Affirmed.

W. R. WRAPE STAVE COMPANY *v.* ARKANSAS STATE GAME & FISH COMMISSION.

4-8849 219 S. W. 2d 948

Opinion delivered May 2, 1949.

D. K. Hawthorne, Wootton, Land & Matthews, Elbert Cook, Watson, Ess, Whittaker, Marshall & Enggas, and *Armistead, Rector & Armistead,* for appellant.

Ike Murry, Attorney General, *Jeff Duty,* Assistant Attorney General, *Oscar Ellis, Neill Bohlinger, Clark & Clark, Russell Roberts,* and *Ed E. Ashbaugh,* for appellee.

GRIFFIN SMITH, Chief Justice. The State Game and Fish Commission sought by Circuit Court action to con-

demn lands in Faulkner County for a game and fish reserve, under authority of Amendment No. 35 to the Constitution. By construction of a dam across Palarm Creek a lake covering between six and seven thousand acres would be created at a maximum elevation of 261 feet above sea level. The creek, sluggish in dry weather, accounts for a swampy area not reasonably adaptable to agriculture, but yielding commercial timber, such as oak, pine, etc. In addition to the property to be inundated, a margin of twenty feet bordering the shoreline would be included, all in designated sections of Townships Four and Five North, Range Thirteen West. The complaint listed sixty tracts and 132 defendants, of whom but three have contested court action—W. R. Wrape Stave Company, Dierks Lumber and Coal Company, and Magnolia Pipe Line Company.

Wrape's holdings include 160 acres from which all of the timber has been taken, and 700 acres of partly cut land. The property is not for sale and no definite value was stated, although $10 per acre might be a fair price for the cutover acreage. Dierks owns 680 acres purchased in 1946 and 1947 for $21,800. It was thought to be worth $25,000 for timber and growing purposes.

Magnolia Pipe Line Company has projected a twenty-inch line from Texas to Illinois, beginning at Corsicana, traversing Arkansas, and terminating near Patoka, in Marion County, Ill.

In a joint action by Wrape, Dierks, and Magnolia, the condemnation suit was removed to Federal Court, but was remanded upon determination by Judge Lemley that in respect of the relief sought, the Commission was the State, and the State, acting in its sovereign capacity, is not a "person" within the Act of Congress. Jud. Code, § 28, 28 U. S. C. A., § 71. *Arkansas State Game and Fish Commission* v. *W. R. Wrape Stave Co., et als,* 76 Fed. Sup. 323. On remand the defendants alleged equitable defenses not cognizable at law, and the causes were transferred to Chancery on petition for injunctions and on cross-complaints.

Allegations were (a) that condemnation was not authorized for the purposes contemplated, (b) the Com-

mission was not the real party in interest, (c) funds were not available to finance the undertaking or to pay damages, (d) Conway sewage would contaminate the lake and destroy fish, (e) no effort was made in any case to acquire property by purchase or gift, (f) maps were not filed, (g) the Commission's resolutions authorizing the project were insufficient, and (h) "Where land has been devoted to a public use, [as in case of rights acquired by the Pipe Line Company] it may not be subjected to subsequent condemnation for another public use which would impair its first use, in the absence of constitutional or statutory authority, either expressed or necessarily implied."

Five express findings were made by the Court, upon which the decree dismissing the cross-complaints for want of equity was predicated: (1) On the issue of authorized purpose—that is, whether Amendment No. 35 intended that Commission funds should be spent for a preserve such as was indicated by the Palarm dam, and whether property involved could be taken by condemnation—the Chancellor said the only testimony was that of T. A. McAmis, Executive Secretary of the Commission, who in all respect verified the contention that the end sought was ". . . for the conservation of birds, fish, game, and [other] wild life, and to create a recreational area for use of the citizens of the State at large." (2) That at a pre-trial conference May 29 it was determined that the Commission was the real party. (3) The cross-complaint could not, as a defense to the Commission's proposal to condemn, question the source from which payments would come. (4) The Court would assume good faith upon the part of Conway municipal authorities in pledging an appropriate diversion of sewage, to the end that contamination of the lake would not occur. (5) Section 4994 of Pope's Digest relating to negotiations in an effort to agree upon easements, applies to railroad, telegraph, and telephone companies, "or a pipe line company."

The Commission, said Judge Ward, had been importuned by many citizens of Faulkner and Pulaski Counties, who urged that the preserve be established,

and "interested representatives" of local groups had acted for the Commission, relieving it of the imputed duty of negotiating, since the contracts so made took the place of direct action by the Commission. The Court was not convinced that Magnolia was a common carrier devoted to public service of a character preventing the State from condemning, for concurrent use, land over which the pipe line passed, hence a subsequent grant in the circumstances shown would not destroy the primary right, or impair appellant's property in a way not compensable in damages.[1]

First—Amendment No. 35.—The underlying purpose seems to have been (§ 1) to vest in the Commission "The control, management, restoration, conservation, and regulation of birds, fish, game, and wild life resources of the State." Funds arising from all sources, including the sale of property, (§ 8) shall be expended by the Commission ". . . for the control, management, restoration, conservation, and regulation of bird, fish, and wild life, . . . including the purchases or other acquisitions of property for said purposes and for the administration of the laws pertaining thereto, and for no other purpose. [The Commission shall have the power] to acquire by purchase, gifts, eminent domain, or otherwise, all property necessary, useful or convenient . . . in the exercise of any of its duties, and in the event the right of eminent domain is exercised, it shall be . . . in the same manner as now or hereafter provided for the exercise of eminent domain by the State Highway Commission."

The Highway Commission, (Pope's Digest, § 6593) if it condemns, must proceed in the manner provided for railroad, telegraph, and telephone companies. Act 71 of 1929.

The Game and Fish Commission is given a very broad discretion in determining how wild life shall be conserved. Not only may it acquire, by condemnation or

[1] By § 5081 of Pope's Digest, pipe line companies are given the right of eminent domain. Procedure for exercising the right is the same as that prescribed for railroad, telegraph, and telephone companies. Ark. Stats. (1947) §§ 73-1901-2.

otherwise, the property actually needed, but it may also procure any that may be "*useful or convenient* . . . in the exercise of any of its duties"; and, while in matters of mere convenience the power would not be unlimited, yet the italicized words serve to emphasize a plan by those who framed the Amendment—a bilateral purpose to conserve wild life, and to place that duty with the Commission. Although appropriations must come from the General Assembly, money received from sources mentioned in the Amendment is not available—even with legislative approval—for any uses other than those expressed or necessarily implied; and the Commission determines what property is needed.

In the case at bar it is insisted that sportsmen from Conway and Little Rock, for reasons of personal convenience, have promoted the project, and that in yielding to importunities by these groups the Commission has not acted for the best interests of all of the people. This conclusion, appellants intimate, finds support in the fact that Federal agencies, when approached by representatives of the Conway Chamber of Commerce, refused to participate in this or similar ventures, thus inferentially saying the refuge was not a public necessity within the meaning of Amendment 35, or that plans for construction of the dam, when considered in connection with flowage costs, rendered the venture impracticable.

But the Commission's duties, and its right of determination, are not to be measured by mere doubt-creating suggestions; and an unnamed agency's failure to assist falls short of being proof that the Commission's purposes are ill-conceived.

By resolution[2] the Commission first set aside $65,000—a sum it subsequently concluded was insufficient; so in June 1948 the allocation was increased by $10,000. This, said Mr. McAmis in testifying, was intended as the State's full expenditure for acquisition of the property and construction of the dam. A voucher for $40,000 was drawn against the $75,000 allotment and paid into the Court registry to compensate damages for

[2] The resolutions passed by the Commission were not formal. Action of that body is reflected by the approved minutes.

property that might be taken. This left $35,000 of the "ear-marked" fund for use in building the dam—an undertaking formerly estimated at $65,000. However, said McAmis, "The Commission can [set aside for this project] additional money at any time it is needed."

It was shown that a new appropriation ($300,000 for each year of the biennium ending June 30, 1951) had been made by the Fifty-Seventh General Assembly to purchase lands "in areas suitable for public hunting, public fishing," and kindred activities.

A stressed point in appellants' argument is that failure of the Commission to strictly comply with Act 271 of 1941 requires reversal of the judgments. The Act provides that condemnation shall be in the name of the State for use of the Game and Fish Commission, ". . . and before any such suit can be brought it shall be necessary for the Commission to unanimously pass a resolution to that effect, setting forth the necessity and purpose for which the land is to be condemned, together with the legal description of the lands sought to be condemned. A copy of the resolution shall be transmitted to the Prosecuting Attorney of the district in which the land is situated, and it shall be the duty of the Prosecuting Attorney to institute proper proceedings for the condemnation of such lands." Another requirement of the Act (§ 3) is that "Before any such action may be maintained it must appear that the General Assembly has made adequate appropriation which is available at the time the suit is filed with which to pay damages assessed by the jury for the taking of such land."

Appellee contends—and correctly, we think—that Amendment 35 is complete within itself, and that prior legislative Acts, whether directive or restrictive in nature, have been superseded. It seems to have been the purpose of those who wrote the Amendment to cover the whole subject, and to either provide, or leave to the Commission, methods for reaching these ends. See *Adams* v. *DeWitt Special School District,* 214 Ark. 771, 218 S. W. 2d 359.

In support of their belief that cross-complaints were erroneously disposed of, appellants point to what they term legislative attempts, by Act 207 of 1947, to provide funds for the Commission's use in purchasing lands. The language, they say, is too general, hence—for want of specific allocation—the mandate of Art. 5, § 29, of the Constitution, has not been complied with. *Director of the Bureau of Legislative Research* v. *MacKrell,* 212 Ark. 40, 204 S. W. 2d 893. The Act also provides that before money can be spent for authorized purposes, the particular project ". . . shall be approved by the United States Fish and Wildlife Service and/or United States Forestry Service and/or the United States Soil Conservation Service, or similar Federal agency having Federal jurisdiction of Federal Aid Programs in Arkansas."

We do not determine (a) whether Act 207 was invalid for want of specific words of appropriation, or (b) whether the requirement for Federal agency approval was likewise indefinite. Approval was given by a Federal authority that did not have matching money.

Had the Act been open to the flaws now complained of, issuance of a voucher within the fiscal period might have been halted by one proceeding appropriately for that purpose. Either the Commission's disbursing agent, the Auditor of State, or the State Treasurer could have been enjoined. But appellants say they were not notified that the Commission intended to issue the voucher, hence they did not have an opportunity to protest. Answer is that notice was not required. When the money was paid into Court, termination of the fiscal year, and expiration of the period for which the appropriation was made, lost significance. The voucher was drawn and the warrant issued within two years from effective date of the appropriation, and in this respect the Constitutional limitation as to time was complied with. It must be remembered that 129 other defendants are, or may be, concerned with the attempt of these three appellants to require a refund of the $40,000 item. As to them, attack on the appropriation bill is collateral to the principal

controversy, and it has no relation to the Commission's power to seek condemnation.

Chief Justice HART, speaking for an undivided Court in *Crawford County* v. *Simmons,* 175 Ark. 1051, 1 S. W. 2d 561, said that a County Court order changing a public road on petition of the State Highway Commission was not void for want of notice to landowners. He cited Act 5 of the Special Session of 1923. The decision sustained an order "laying out" the road, and allowing a year within which claims could be filed and damages assessed. The order was not faulty on Constitutional grounds relating to property taken for public use, and the requirement for compensation. *Barton* v. *Edwards,* 120 Ark. 239, 179 S. W. 354. In the Barton case it was expressly held that payment for the taking of private property for construction of a public road need not precede the taking. There is no presumption that the State or its subdivisions are insolvent. In that case depreciated scrip was held to be good as payment. This rule was modified in effect when a provision of Act 65 of 1929 was held unconstitutional. The Act authorized the Highway Commission to condemn lands "without the necessity of making a deposit of money before entering into possession of the property condemned." *Arkansas State Highway Commission* v. *Partain,* 192 Ark. 127, 90 S. W. 2d 968. In the case just cited it was said: "There is authority in the law whereby the Court, in which condemnation is prayed, may require a deposit in Court of a sum of money sufficient to pay any and all damages which may reasonably be assessed; and the deposit must be in the registry of the Court where the damages will be assessed. . . . This deposit is in effect the payment, and in advance, which the Constitution requires as a condition precedent upon which the property must be taken. Such an order of the Court and a deposit pursuant thereto [place] the fund in the hands of and subject to the control of the Court. The showing that there is or was money in the State Treasury in a sum sufficient to pay the damages does not suffice. . . . In so far as [Act 65] permits the State Highway Commission to enter into the possession of private property, without first compen-

sating the owner for the damages sustained by actual payment of the amount of such damages, or by deposit of money covering them, in the Court where the right is sought to be exercised, [the Act] is violative of § 22 of Art. 2 of the Constitution."

It was said in *Arkansas State Highway Commission* v. *Hammock,* 201 Ark. 927, 148 S. W. 2d 324, that the action to condemn was a proceeding in *rem,* but that entry upon the property—the actual act of taking—would be restrained at the instance of the owner until payment had been made.

Rules pertaining to condemnation were reviewed in *Selle* v. *City of Fayetteville,* 207 Ark. 966, 184 S. W. 2d 58. The City, without paying the award or making a court deposit, gave notice of abandoning the rights it had acquired through condemnation. That right was sustained. The opinion cites *South Carolina State Highway Department* v. *Bobotes,* 180 S. C. 183, 185 S. E. 165, 121 A. L. R. 1, where the Court said that in the absence of statutory provision to the contrary, the Highway Department could abandon a condemnation proceeding "with consequent nonliability for the amount awarded, even after judgment has been entered on a jury's assessment of the value of the property and an appeal therefrom has been noted."[3]

In the case at bar it is shown that citizens of Conway and Little Rock made substantial contributions to a fund for use of the promotion committee, and that the committee, coöperating with the Game and Fish Commission, would furnish money for the undertaking. It is not urged that this intangible fund has any standing as a cash tender; nor has it.

Second—Claim of Priority by Pipe Line Company.—There was testimony on behalf of Magnolia that its line would be covered to a depth of from two to three feet "over most of it," and in places the maximum would reach six or seven feet. The Company's engineers felt that if the waters should be impounded the entire line

[3] The legislative authority under which Fayetteville sought to condemn was Act 135 of 1929, where the procedure is that applicable to railroads.

ought to be relocated. This would cost $150,000 or $200,000. But, said the witnesses, there were methods by which the pipe could be wrapped, or encased, affording sufficient protection to prolong usability indefinitely.

When in capacity operation the line carries 100,000 barrels per 24-hour day, for which an average charge of 30c is made. Loss incident to shutting down for a day would be $30,000. In addition, a heavy break would pollute the water and probably destroy the fish.

We do not reach these objections. They are elements of damage for the trial Court's consideration when an order of condemnation is made. The present appeal is from the Court's refusal to enjoin the Commission from constructing the dam and procuring a condemnation order. The testimony is considered in determining whether the Chancellor erred in holding that the project would not be so costly or impracticable as to impute to the Commission capricious conduct.[4]

The Chancellor was not, under the evidence, required to find that Magnolia's use of its property would be so adversely affected by the lake as to deprive the Company of essential easement rights. Under Amendment 35 the Commission, acting for the State, has a paramount duty to the public. If Magnolia's commerce can be reasonably maintained under the limited overflow suggested; or if there can be relocation at a cost not incompatible with the Commission's objectives, the inconvenience and cost to Magnolia—for which there must be compensation—would not justify injunctive interference. Affirmed.

Mr. Justice Robins did not participate in the consideration or determination of this case.

[4] An example of witness uncertainty is shown by the testimony of J. E. McGeath, who as assistant general superintendent for Magnolia expressed opinions as to the Company's probable damage. After saying that life of the pipe would be affected by precipitation, water sediment, mineral content of the lake, condition of adjacent soils, etc., he was asked what effect water would have on the line if it should be appropriately encased. The reply was that there would be longer life, but it would be shorter than non-submerged pipe. Question: "How much shorter?" A. "That is a difficult question to answer. For 100 feet it might be one thing, and for a mile something else. It depends on the character of your soil and whatever corrosive elements you have." There was like uncertainty by line experts. Witnesses testified that it was practical to cross rivers and lakes with pipe lines, and that it was frequently done.

LOWERY, ADMINISTRATOR *v.* STEEL, CHANCELLOR.

4-8860 219 S. W. 2d 932

Opinion delivered May 2, 1949.

[redacted]

Ward Martin, for petitioner.

HOLT, J. July 9, 1946, Juanita Yates sued Edward W. Yates for divorce and alimony. Constructive service was had on Edward W. Yates, he being a non-resident. November 30, 1946, on order of general attachment, an attachment was levied on certain real property of Yates.

December 27th following, Juanita Yates amended her complaint, asking for full value of property converted by her husband, Yates, and there was a decree January 2, 1947, granting her a divorce and a personal judgment, without personal service, against Yates for $5,000. The attachments were sustained and it was ordered that all interests of defendant, Yates, be sold for

the satisfaction of this decree. In accordance with the decree, the property was sold, purchased by Juanita Yates and confirmed April 12, 1947. Edward W. Yates appealed from that part of the decree awarding Juanita Yates personal judgment against him for $5,000. He remarried and died before the cause was heard by this court. Thereafter, the case was revived in the name of the present administrator.

This court (Lowrey, Administrator v. Yates, 212 Ark. 399, 206 S. W. 2d 1) reversed the decree holding: (Headnote 1) "Where appellee sued for divorce and after default on the part of her husband she filed an amendment to her complaint praying for a division of property and recovery of judgment to compensate her for money belonging to her which he had converted to his own use, a new cause of action was set up rendering service of process on him necessary and in the absence of which the court was without jurisdiction to proceed." In remanding the case, we said: "For the error indicated, the decree is reversed and the cause remanded with directions to set aside the sale of the property involved, cancel the certificates of purchase to appellee, and for further proceedings consistent with this opinion."

January 15, 1949, the administrator, Lowery, filed in this court an original proceeding in which he now seeks, by his petition, a Writ of Prohibition against the Hon. A. P. Steel, Chancellor of the Little River Chancery Court, to prohibit "respondent from granting and holding a new trial in said cause." He alleged in his petition, among other things, "that portion of the decree, having to do with the judgment for Five Thousand Dollars ($5,000), was appealed to this court and reversed in the case of Lowery, Administrator vs. Yates and appears in 212 Ark., 399, 206 S. W. 2d 1," and that the opinion contained the directive, supra.

He further alleged that respondent lacked jurisdiction and "on the state of the record, petitioner earnestly insists that the mandate of this court, reversing the Lowery case, supra, and remanding with directions to

set aside sale of the property involved, cancel the certificates of purchase to appellee and for further proceedings consistent with the opinion meant nothing more than to render a decree in accordance with the record; because when new trials upon an old case, or any part thereof, or intent, it has become the established practice of this court, in equity cases to give special directions to that effect; and that the Writ of Prohibition should be granted." We cannot agree.

"The office of the writ of prohibition is to restrain an inferior tribunal from proceeding in a matter not within its jurisdiction; but it is never granted unless the inferior tribunal has clearly exceeded its authority and the party applying for it has no other protection against the wrong that shall be done by such usurpation. *Order of Railway Conductors of America* v. *Bandy, Judge,* 177 Ark. 694, 8 S. W. 2d 448, and cases cited." *Merchants & Planters' Bank* v. *Hammock,* 178 Ark. 746, 12 S. W. 2d 421, and "The writ is never issued to prohibit an inferior court from erroneously exercising its jurisdiction, but only where the inferior tribunal is wholly without jurisdiction, or is proposing or threatening to act in excess of its jurisdiction." *Bassett* v. *Bourland,* 175 Ark. 271, 299 S. W. 13.

We hold that the Chancery Court has jurisdiction under the opinion, supra, and our directive therein, and is not, on the record presented, threatening to act in excess thereof.

Whether the respondent's future actions relating to this case may be right or wrong, are questions which cannot be corrected by prohibition, but only by appeal.

The petition for Writ of Prohibition is therefore denied.

4-8800 219 S. W. 2d 930

Opinion delivered May 2, 1949.

A. D. Shelton and *Mallory & Rasmussen,* for appellant.

Leland F. Leatherman, for appellee.

HOLT, J. April 27, 1948, the City of Hot Springs enacted the following Ordinance: "ORDINANCE NO. 2186—AN ORDINANCE PROHIBITING THE OPERATION OF CERTAIN GROCERY STORES AND/OR MEAT MARKETS ON SUNDAY AND FOR OTHER PURPOSES.

"WHEREAS, a custom has recently arisen in the City of Hot Springs whereby a large number of employees have been required to perform services on Sunday in various large grocery stores and/or meat markets, which has deprived said employees of their day of rest and worship, and,

"WHEREAS, this condition is intolerable by reason of the exacting duties required of said employees and should be remedied.

"NOW, THEREFORE, BE IT ORDAINED BY THE CITY COUNCIL OF HOT SPRINGS, ARKANSAS:

"SECTION 1. Every person who shall, on Sunday, keep open any grocery store and/or meat market, which is staffed, maintained and/or operated by more than two persons, whether owners and/or employees, or retail any goods, wares or merchandise therefrom, or who shall keep the doors of the same so as to afford ingress or egress, shall, on conviction thereof be fined in any sum not less than twenty-five dollars nor more than one hundred dollars; provided that charity or necessity on the part of the customer may be shown in justification of the violation of this ordinance.

"The purpose of this ordinance is to prohibit the operation of grocery stores and/or meat markets on Sunday where more than two persons, whether owners and/or employees are required to staff, maintain and operate same.

"SECTION 2. All ordinances or parts of ordinances in conflict herewith are hereby repealed.

"SECTION 3. It is found and declared in many instances in the City of Hot Springs that the employees of the larger grocery stores and/or meat markets are forced to work in said stores and/or meat markets on Sundays and are thereby denied their right to attend church services and are denied their day of rest and worship, and it is further found and declared that there is no inspection on Sundays of fresh meats, goods, wares and merchandise sold by said stores, which creates a health hazard, and because of these conditions and this ordinance being necessary for the immediate preservation of the public peace, health and safety, an emergency is hereby declared to exist, and this ordinance shall be in full force and effect from and after its passage and approval."

On May 8, thereafter, appellee, Gray, was convicted in the Municipal Court of that city of violating this ordinance and fined $25. He was thereafter twice tried

and convicted for two other separate and similar offenses and fined $25 in each of these cases. On appeal to the Circuit Court, the three charges were, by agreement, consolidated for trial.

It was stipulated that appellee operated a grocery store in Hot Springs, that more than two persons were employed therein, and that the facts were the same in each of the three cases.

Appellee defended on the ground that the ordinance, supra, was void and unconstitutional. The trial court sustained appellee's contention. The decree recites: "The ordinance is declared unconstitutional, and the convictions of the defendant by the Municipal Court of Hot Springs are reversed and the appeals dismissed."

From the judgment comes this appeal.

We have many times announced the rule that: " 'Counties, cities and towns, * * * are municipal corporations, created by the authority of the Legislature; and they derive all their powers from the source of their creation, except where the Constitution of the State otherwise provides.' " *Eagle et al* v. *Beard et al,* 33 Ark. 497, and in *Kitchens* v. *Paragould,* 191 Ark. 940, 88 S W 2d 843, we said: "We must say, when the issue is properly presented, whether legislation is in conflict with provisions of the Constitution. Ordinarily we look only to the statutes to determine what powers have been delegated to cities and towns. We regard as axiomatic that cities and towns are creatures of the Legislature, subject to its control, and that they can function only within the limits fixed by law. Eagle v. Beard, 33 Ark. 497."

Section 41-3802, Ark. Stats. (1947) enacted more than a century ago, provides: "Keeping store or doors open on Sunday—Penalty.—Every person who shall, on Sunday, keep open any store or retail any goods, wares and merchandise, or keep open any dram shop or grocery, or who shall keep the doors of the same so as to afford ingrees (ingress) or egrees (egress), or retail or sell any spirits or wine, shall, on conviction thereof, be

fined in any sum not less than twenty-five ($25) dollars, nor more than one hundred dollars ($100). (Rev. Stat. ch. 44, div. 7, art. 2, § 5; Act. March 2, 1885, No. 33, § 2, p. 37; C. & M. Dig., § 2736; Pope's Dig., § 3421.)''

This section of the statute was held constitutional by this court in *Shover* v. *State,* 10 Ark. 259. Its terms are so plain and understandable that no judicial construction is required.

Keeping open ''any store or retail any goods, wares and merchandise, or keep open any dram shop or grocery,'' is obviously forbidden. It could make no difference whether the grocery store, in the present case, was operated by the owner, with or without the assistance of one or more employees, the Legislative mandate prohibits it.

We think it obvious from the mere reading of the ordinance that it is void for the reason that it attempts, in effect, to permit grocery stores employing less than two people to open and operate on Sunday. The ordinance is in the very teeth of the statute and therefore void. It does not follow, however, that the judgment of the trial court should be affirmed.

The Municipal Court had jurisdiction of the charges against appellee under the above provision of our State law and it could make no difference that the Ordinance under which he was prosecuted and convicted was void as inconsistent with the above statute.

'' 'Though a town ordinance under which defendant was prosecuted * * * was void as inconsistent with the state law, a conviction in the mayor's court must stand, where the crime charged was covered by a statute, since the mayor had jurisdiction as justice of the peace to enforce the statute.' To the same effect, see, also, Marianna v. Vincent, 68 Ark. 244, 58 S. W. 251; Watts v. State, 160 Ark. 228, 254 S. W. 486; Fly v. Fort Smith, 165 Ark. 392, 264 S. W. 840; Wilson v. Batesville, 179 Ark. 1094, 20 S. W. 2d 114,'' *Thompson* v. City of Little Rock, 194 Ark. 78, 105 S. W. 2d 537.

In *Marianna* v. *Vincent,* supra, this court held: (Headnote) ''Defendant was charged before the mayor

of an incorporated town with selling liquor without license, and convicted of violating a town ordinance prohibiting the sale of liquor without license. On appeal to the circuit court he was discharged on the ground that the ordinance under which he was convicted was void. On appeal to the supreme court, held that, whether the ordinance in question was void or not, the mayor, having the same criminal jurisdiction as a justice of the peace (Sand. & H. Dig., § 5256), had jurisdiction to try him for a violation of Sand. & H. Dig., § 4862, making it a misdemeanor to sell liquor without a license," and in the body of the opinion, it was said: "The mayor having once obtained jurisdiction, the case should not have been subsequently dismissed for want of jurisdiction by the circuit court, merely on mistakes of law made by the mayor, or for any other irregularity; but it should have proceeded to try the case de novo, and render such judgment, as was proper therein. The judgment of dismissal is therefore reversed, and the cause is remanded for further proceedings not inconsistent herewith."

So here, in the circumstances, the Circuit Court, on appeal, should have proceeded to try the charges against appellee *de novo* and render such judgment as was proper.

For the error indicated, the judgment is reversed and the cause remanded for further proceedings consistent with this opinion.

GRIFFIN SMITH, C. J. and Justices MCFADDIN and GEORGE ROSE SMITH concur.

JOHNSON *v.* SMITH.

4-8816 219 S. W. 2d 926

Opinion delivered May 2, 1949.

Keith & Clegg, for appellant.

Smith & Sanderson, for appellee.

George Rose Smith, J. Cypress Lake, as meandered by Government surveyors in 1841, was a long narrow body of water that crossed the Northwest Quarter of Section 29, Township 16 South, Range 25 West, in a northwesterly direction, isolating a triangle of 8.78 acres in the northeast corner of the quarter. This case involves the title to the east half of the segment of lake bed lying in the quarter section. The appellees, Smith and Mrs. Blocker, who own land on the west side of the lake, brought suit to quiet their title to the disputed strip. There were originally two classes of defendants: (a) Appellants Johnson and wife, who own the land on the east side of the lake and assert title as riparian owners, and (b) the State and its oil and gas lessees, who asserted ownership on the theory that the lake is navigable. At the first hearing these appellants and appellees successfully joined forces against the State claimants and obtained a decree finding that Cypress Lake is a non-navigable body of water. The decree was entered without prejudice to the present controversy,

which was reserved for determination at a later trial. The State and its lessees did not appeal from the first decree and have passed out of the case.

At the second hearing the question was that of ownership as between the appellants and the appellees. This dispute has its roots in a number of past transactions. The appellees bought the farm on the west side of the lake in 1919, their deed describing this particular tract as all that part of the quarter section lying west of the lake. Appellee Smith testified that there was then a fence along the east bank of the lake, which his grantor pointed out as the eastern boundary. There was testimony that the lake bed was then practically dry and that appellees' vendor had used it as a pasture.

In 1924 appellees bought the farm east of the lake, now owned by appellants, the deed describing this tract as all that part of the quarter section lying east of the lake. Appellees mortgaged this second farm to Cantley, as receiver of a land bank. In 1935 Cantley foreclosed his mortgage and bought in the property. Thus at that time appellees had record title to the land lying west of the lake and Cantley to that lying east of it. Of course the presumption would be that each riparian title extended to the center of the lake. *Gill v. Hedgecock,* 207 Ark. 1079, 184 S. W. 2d 262.

Appellees rely mainly upon an oral agreement between them and Cantley, by which an agreed boundary was fixed in the latter part of 1939. According to the testimony T. H. Albers, as Cantley's agent, employed a surveyor to run the boundary line between the two farms. The surveyor fixed the line along the east bank of the lake bed and prepared a plat in accordance with his survey. Appellee Smith, who testified that he was acting for himself and his cotenant, was present when the survey was made and says in effect that he and Albers agreed upon the line.

Soon after the survey was made Cantley forwarded to Smith a quitclaim deed by which Smith was to disclaim any interest in the farm east of the lake. The deed recited that a metes and bounds description had not been

definitely determined for that part of the quarter section lying "north" of the lake—this being the same land as that east of the lake, as the tract is both north and east of the bed. The deed also recited that Smith and Cantley agreed that the legal and permanent description should be as follows—after which there was inserted a metes and bounds description that followed the surveyed line along the east bank. Smith executed the deed, which was filed for record by Cantley in December, 1939. Later a copy of the surveyor's plat was attached and the deed was again recorded in January, 1940. It is conceded that the deed was shown in appellants' abstract of title when they bought their farm.

Cantley sold the land east of the lake to appellants in 1943, but instead of using the surveyor's description he described the tract as all that part of the quarter section lying east of the lake. Appellants contend that as riparian owners they have title to the center line of the lake bed. Appellees base their claim principally upon the agreed boundary line. The chancellor found that the appellees own the entire lake bed.

The testimony concerning the oral agreement is very persuasive. Both Smith and the surveyor testified that the purpose of the survey was to establish the boundary line. Appellants question the proof of Albers' authority to act for Cantley, but we think that there was sufficient evidence apart from Albers' declarations. Cantley paid the surveyor by check and also sent his check to Smith for the consideration recited in the quitclaim deed. That deed was prepared by Cantley, and it recognized the line determined by the surveyor. Later Cantley executed an oil and gas lease containing this same metes and bounds description. These circumstances connect Cantley so closely with the transaction that it may fairly be inferred that Albers was in fact his agent in having the survey made.

Appellants also insist that certain elements of a valid boundary line agreement are wanting. The rule is that such an agreement will be sustained when there is uncertainty as to the true boundary and when the

agreement is followed by possession according to its terms. *Peebles* v. *McDonald,* 208 Ark. 834, 188 S. W. 2d 289. Here the evidence as to the existence of uncertainty and as to possession in conformity to the agreement is in such conflict that it would be a difficult task to determine where the preponderance lies. A decision of that question, however, is not necessary to the disposition of the case.

We cannot be certain that all pertinent evidence considered by the chancellor is before us. The decree recites that the cause was heard upon the oral evidence taken at the first hearing as well as that heard at the second trial. The testimony adduced at the earlier hearing is not in the record here. Unless we can say that it could not have any bearing upon the issues now presented, we must assume in fairness to the chancellor and to the appellees that the omitted evidence supported the decree.

At the first trial the issue was navigability of the lake. Several allegations in the complaint are relevant both to that issue and to the situation existing when the oral boundary agreement was made. It was stated in the complaint that appellees have had adverse possession of the property for twenty-eight years, from which it might follow that the boundary line has become uncertain. It was alleged that the lake bed has been in cultivation; that the meandered bank line has been obliterated by deposits of sediment; that the lake was drained in 1918 and became dry land; and that it has no usefulness for navigation purposes. According to the evidence at the second hearing some of these allegations are exaggerated, to say the least; but it will be remembered that appellants and appellees made common cause against the State claimants at the first trial. It is safe to assume that they made the strongest possible showing of non-navigability, and it would certainly have been helpful for them to prove that the lake bed had actually been cultivated for many years. Such evidence may easily have shed light also on the issues we are now considering.

Even though the first decree was entered without prejudice to the present dispute, it does not follow that the trial court may not have considered the evidence then submitted when he reached his decision at the second hearing. If the appellees expected him to do so, there was no need for them to submit their proof a second time. Since the recitals in the decree indicate that the chancellor did consider the earlier proof, we have no assurance that we have been furnished with all pertinent evidence. We must therefore affirm the decree.

VANNDALE SPECIAL SCHOOL DISTRICT No. 6 *v.* FELTNER.

4-8862 220 S. W. 2d 131

Opinion delivered May 9, 1949.

J. L. Shaver, for appellant.

Giles Dearing, for appellee.

HOLT, J. This cause is here on a second appeal. For a more complete statement of the facts, reference is made to our opinion in the former appeal, (Vanndale Special School District No. 6 v. Feltner, 210 Ark. 743, 197 S. W. 2d 731) wherein the judgment was reversed for error in giving a certain instruction and the cause remanded for further proceedings consistent with that opinion.

After certain amendments to appellee's answer and appellant had "set up an additional title by reason of a deed dated June 27, 1947, from Mary Lee Mann to Vanndale Special School District No. 6," the case was, by agreement, submitted to the court, sitting as a jury, on the following stipulated facts: "Mary Lee Mann was the owner of the following lands in Cross County, Arkansas, to-wit: The west half (W½) of the northeast quarter (NE¼) and the northeast quarter (NE¼) of the northeast quarter (NE¼) of section thirty-one (31) in township nine (9) north and range three (3) east.

"That both the plaintiff and the defendants claim title to the lands and the improvements located thereon here in dispute from the above common grantor.

"That Arthur Mann and Mary Lee Mann conveyed to W. R. Williams, R. G. Isom, W. Harden, School Directors of School District Number 3 in Cross County, Arkansas, on December 18, 1914, certain lands as set forth in said deed, * * * Exhibit 'A' to this stipulation." (Deed recorded March 31, 1917).

The land conveyed in the deed was described: "The following lands lying in the County of Cross and State of Arkansas, to-wit: So long as said land is used for school purposes and no longer. Beginning at a stake on the old Memphis & Batesville Military Road at the northwest corner of the northeast ¼ of the northeast ¼ of section 31, township (9) nine, range (3) three east and running parallel with section line east 70 yards thence south 70 yards; thence west 70 yards to Memphis &

Batesville Military Road; thence north 70 yards with said road to place of beginning containing one acre more or less.''

''That said School District at no time since the execution and delivery of said deed to it ever went into possession of said acre of ground above described, or that it at any time ever used said acre of land for school purposes, or for any other purpose.

''That said school district did shortly after the execution of said deed take possession of a diamond shaped piece of ground containing about one-half an acre and located in the northwest quarter (NW¼) of the northeast quarter (NE¼) of section thirty-one (31) in township nine (9) north, range three (3) east, which was located about a quarter of a mile from the land actually deeded and as described in said Exhibit 'A', and erected thereon the school house there which is now in dispute, and actually maintained and operated a school thereon for about thirty years, when said School District Number 3 was consolidated with Vanndale School District Number 6; that the Plaintiff District, or District Number 3 at no time had a deed from anyone to said diamond shaped tract of land where said school was located. * * *

''On September 20th, 1917, Mary Lee Mann and Husband, Arthur Mann, by their warranty deed conveyed to Jo L. Hutton the following lands, to-wit: The northeast quarter (NE¼) of section thirty-one (31) in township nine (9) north, range three (3) east in Cross County, Arkansas. (Deed recorded). And that the chain of title from the said Jo L. Hutton passed by mesne conveyances to T. E. Lines.

''On January 20th, 1945, T. E. Lines and wife, by their deed, conveyed the said lands to this Defendant, W. D. Feltner, which deed is duly recorded. * * *

''On June 27, 1947, Mary Lee Mann by a quitclaim deed conveyed to Vanndale School District Number 6 the following: 'All my right, title and interest that I may have in and to the property that was used by School

District Number 3 and Vanndale School District Number 6 for school purposes, and located in the northwest quarter of the northeast quarter of section 31 in township 9 north, and in range 3 east.' (Deed recorded July 5, 1947).

"That T. E. Lines is not an heir of Mary Lee Mann.

"That the mandate of the Supreme Court in this cause reversing said case and directing the Court to proceed further is hereby incorporated as a part of the record and a part of the stipulation.

"It is agreed by and between counsel that this cause may now be submitted to the Court upon this stipulation."

The trial court found that M. D. Feltner was the owner and entitled to the possession of the property. The judgment contained this recital: "The plaintiff, Vanndale Special School District No. 6, took the property involved (either oral or written) by the terms of which the title was to revert to the grantor when no longer used for school purposes; that said reversionary right was such an interest in property as could be conveyed under the statutes of the state though not at common law. Mary Lee Mann and her husband by their deed of September 20, 1917, conveyed whatever interest they had in the land in question to Jo L. Hutton and by mesne conveyances the same passed to defendant's grantor, T. E. Lines. The question of the abandonment of the property by the School District was settled at the first trial; that the defendant, W. D. Feltner, is the owner and entitled to the possession of said property."

The effect of our former opinion was to remand the case for further proceedings and to allow Feltner the opportunity to show that he was not a trespasser, but derived title to the school property from his grantor, Lines, and that Lines was either an heir or a grantee of Mary Lee Mann.

The court did not err in permitting him to make this showing.

On the stipulated facts, Mary Lee Mann held possession and title to the land in question until she conveyed it, by warranty deed, to Jo Hutton September 20, 1917. Thereafter, by mesne conveyances, the interest and title of Jo Hutton passed to T. E. Lines, and thence from him to appellee, Feltner.

Mary Lee Mann by deed dated December 19, 1914, conveyed the acre tract to School District No. 3 (appellant's predecessors in title) "so long as said land is used for school purposes and no longer." The effect of this deed was to create a determinable fee in appellant, district. This acre tract has never been used for school purposes by appellant, but a half acre diamond shaped tract, about a quarter of a mile from the one acre tract, was so used.

We said in the very recent case of *Taylor* v. *School District No. 45 of Searcy County,* 214 Ark. 434, 216 S. W. 2d 789, wherein the land had been conveyed to a school district "so long as used for school purposes:" "The effect of the deed was to vest a determinable fee in the district, which would terminate automatically and without the necessity of re-entry if the grantee abandoned its use of the property for school purposes."

The title, therefore, to this one acre tract reverted to Mary Lee Mann, and appellee, Feltner, by mesne conveyances, as indicated, acquired title and should have possession.

As to the one-half acre diamond shaped tract, supra, —appellant has no enforcible interest in this one-half acre tract whatever, according to this record.

The District's claim of title by adverse possession was settled against appellant on the former appeal.

Appellant now says that: "After the decision of this case on April 14, 1947, Mary Lee Mann, the common title holder to both complaining parties, and the person who reserved the reverter in the deed to School District No. 3, and after the jury in the lower Court had found that there was an abandonment for school purposes, quit-claimed her interest in said property to the Vann-

dale School District, the appellants here." (June 27, 1947).

This deed, however, did not affect appellee's title since Mary Lee Mann and her husband on September 20, 1917, conveyed all title and interest in all this land to Jo L. Hutton and by mesne conveyances title had passed to appellee, Feltner, and as indicated, he became the rightful owner and in no sense a trespasser. In short, Mary Lee Mann has nothing to convey and the district acquired nothing by this quitclaim deed.

On the whole case, finding no error, the judgment is affirmed.

GREEN *v.* WHITNEY.

4-8882 220 S. W. 2d 119

Opinion delivered May 9, 1949.

Limwood L. Brickhouse and *Downie & Downie,* for appellant.

Ward Martin, for appellee.

MINOR W. MILLWEE, Justice. This is a suit by plaintiff, Lydia Green, against her son-in-law and daughter, Chester A. Whitney and Ruth Whitney, to set aside a deed and vest title in plaintiff to certain property located at 804 Izard Street in the City of Little Rock. The trial court declined to grant the relief sought, but instead found that a trust arose in favor of plaintiff in the amount of $3,059.89 expended by her in obtaining execution of the deed to defendants and improving the property. The court also declared an equitable lien upon the property to secure payment of the judgment. Plaintiff, Lydia Green, has appealed and defendant, Chester A. Whitney, has cross-appealed.

The decree contains findings of fact as follows: "The plaintiff, Lydia Green, is a colored woman, eighty years of age, and defendants are son-in-law and daughter of the plaintiff.

"In March of 1944 the plaintiff, Lydia Green entered into an agreement with Annie Johnson, the owner of property described as Lot 11, Block 248, Original City of Little Rock, Pulaski County, Arkansas, whereby the said Annie Johnson was to convey this property to the plaintiff, Lydia Green, for the following considerations, to-wit:

"The sum of One Dollar ($1.00) in hand paid by Lydia Green, and the covenants and agreements on the part of Lydia Green to maintain Annie Johnson on the premises throughout the lifetime of Annie Johnson in a comfortable condition; the further condition that Lydia Green immediately provide for Annie Johnson reading glasses, a set of false teeth and the proper clothing for her comfortable maintenance; the further consideration that Lydia Green would pay to Luvenia Smith the sum of $429.47 as reimbursement to the said Luvenia Smith of all taxes paid by her upon the above-described property; the further consideration that Lydia Green would pay the sum of $100 to C. P. Jones.

"It was the understanding between all parties that the defendants in this cause, Chester A. Whitney and Ruth Whitney, son-in-law and daughter of the plaintiff, Lydia Green, would live on the premises with plaintiff Lydia Green and Annie Johnson.

"On the 9th day of March, 1944, the defendant, Chester A. Whitney, wrote to the plaintiff, Lydia Green, requesting that the property be put in his name so that he might 'remain the head of the family', agreeing therein to care and provide for Annie Johnson and Lydia Green for the rest of their lives.

"On the 13th day of March, 1944, the said Annie Johnson executed a warranty deed to the above-described property to the defendants, Chester A. Whitney and Ruth Whitney, who thereby covenanted to perform the conditions set forth above, and, in addition, covenanted to maintain Lydia Green on the premises in a comfortable condition throughout her life.

"The plaintiff, Lydia Green, on the transfer of the property, as consideration for the deed, paid the sum of $429.47 to Luvenia Smith; paid the sum of $100 to C. P. Jones; paid the sum of $50 for false teeth for Annie Johnson, and between March 13, 1944, and June 15, 1944, expended a total of $2,115.42 for alterations and improvements to the property and $365 in furniture for the home.

"After the alterations and improvements were completed, the said Annie Johnson, Lydia Green, Chester A. Whitney and Ruth Whitney moved into the above-described premises and lived there together until August 8, 1946, on which date Annie Johnson died.

"The plaintiff, Lydia Green, continued to live with defendants until the 2nd day of November, 1947, at which time she was forced to leave the home, seek shelter elsewhere and become a subject of charity because of the fact that the defendant, Chester A. Whitney, neglected and abused the plaintiff, subjected her to indignities, and such food, shelter and clothing and other physical necessities as were provided, were provided under con-

ditions which made it impossible for her to use and enjoy those necessities in ease and peace, and that her condition was thereby rendered intolerable.

"Since this cause of action was commenced, the defendant, Ruth Whitney, has filed suit for divorce against the defendant, Chester A. Whitney."

At the time of the execution of the deed in question, Lydia Green was living with defendants on Cross Street and other relatives had contributed to her support. The defendants were married in 1921, but were later divorced and remarried in 1941. Annie Johnson, who was approximately 100 years of age, owned and resided on the property in controversy. She was in debt and unable to provide for herself and the house was in need of extensive repairs.

In December, 1943, and the early part of 1944, Lydia Green received a total of $7,000 from the sale of oil leases on land in Mississippi in which she presumably had some interest. A proposed agreement was reached whereby Annie Johnson would deed her property to Lydia Green upon the latter's agreement to make the payments required by Annie Johnson and support her the rest of her life. A deed to this effect was drafted, but was not executed because of the objections of the defendant, Chester Whitney.

The letter of March 9, 1944, from the defendant, Chester Whitney, to Lydia Green, who was at the time residing with the defendants, is as follows: "Dear Sis Lydia Green, I accept this opportunity to thank you in Jesus' name for your intention of buying us a home, but since this setup isn't based upon righteousness I wish it to be droped, and you keep the money in the bank and I will go on providing for you and Ruth and just as I am doing, that I may remain the head of my house and wife of which Ephesians 5 Chapter and 23 Verse gives me. Or if you have in mind to give me something, I will get the place and deed it in my and Ruth's name and borrow an additional sum from you and give notes on the barber shop till paid back and sign a contract to take care of you and Sis Johnson as long as we live. So there isn't

anything rong in this proposal. Whatever be done will benefit all of us and I remain the head of my family just as I am now and you all haven't suffered. My reason for writing is to avoid unpleasantness whenever i try to explain anything. So be sweet and prarful for us that we always be together till the Lord separates us by death if that's his will. Your son-in-law, C. A. Whitney.''

When Annie Johnson executed the deed to defendants four days later, it was understood by all the parties that Lydia Green's money would be used to make the payments imposed upon the defendants by the terms of the deed and that she would also pay the expense of repairing the house. Annie Johnson resided with the defendants and Lydia Green on Cross Street after the deed was executed and until the repairs were completed in June, 1944, when the four moved to the property in controversy. After the repairs had been completed and paid for by Lydia Green, she learned that her title to the mineral rights in the Mississippi land had failed and she was required to return the balance of the $7,000 remaining after such expenditures.

It is the contention of plaintiff that the trial court erred in refusing to set aside the deed and vest title to the property in her. Plaintiff insists that defendants became constructive trustees of the property for her benefit; and that, since the property is now worth between $6,000 and $7,000, the action of the court has resulted in defendants' realization of a profit by their breach of contract and obligation to plaintiff.

The defendant, Chester A. Whitney, insists that no trust was created in the favor of plaintiff; that the evidence does not sustain the chancellor's finding that defendants breached their contract to support plaintiff; that the judgment for plaintiff was contrary to the pleadings; and that plaintiff's only remedy is an action at law for damages for breach of a contract under which she was merely a third party beneficiary.

It is well settled in this state that the grantor is entitled to cancellation of a deed based on the grantee's promise to maintain and support the grantor upon the

grantee's failure or refusal to carry out the promise. It is also the rule that where such continuing promise to support is broken, equity will presume the transfer to have been fraudulently induced and obtained in the first place. The rule is stated in the leading case of Edwards v. Locke, 134 Ark. 80, 203 S. W. 286, as follows: "This court is committed to the doctrine, which is supported by the great weight of authority, as announced in 4 R. C. L. p. 509, § 22, that: 'Where a grantor conveys land, and the consideration is an agreement by the grantee to support, maintain, and care for the grantor during the remainder of her or his natural life, and the grantee neglects or refuses to comply with the contract, that the grantor may, in equity, have a decree rescinding the contract and setting aside the deed and reinvesting the grantor with the title to the real estate.' Salyers v. Smith, 67 Ark. 526-531, 55 S. W. 936; Priest v. Murphy, 103 Ark. 464, 149 S. W. 98; Whittaker v. Trammel, 86 Ark. 251, 110 S. W. 1046.

"The rationale of the doctrine is that an intentional failure upon the part of the grantee to perform the contract to support, where that is the consideration for a deed, raises the presumption of such fraudulent intention from the inception of the contract and, therefore, vitiates the deed based upon such consideration. Such contracts are in a class peculiar to themselves, and where the grantee intentionally fails to perform the contract, the remedy by cancellation, as for fraud, may be resorted to regardless of any remedy that the grantor may have had also at law." (Citing cases).

In most of our cases the suit is between the grantor and grantee and cancellation furnishes full and appropriate relief by reinvesting title to the property in the grantor. The case at bar presents a different factual situation in that plaintiff is not named as a grantor in the deed but merely as a beneficiary. Defendant argues that plaintiff cannot, therefore, demand cancellation because if such relief is granted the title would reinvest in the heirs of the grantor, Annie Johnson. Plaintiff contends that under the doctrine of presumed fraud as announced in Edwards v. Locke, supra, defendants are in the same

position in equity as though they had wrongfully converted plaintiff's money and used it to purchase the property and should be deemed constructive trustees of the property for plaintiff. Plaintiff relies on the general rule as stated in Humphreys v. Butler, 51 Ark. 351, 11 S. W. 479, and many other cases, as follows: "In general, whenever the legal title to property, real or personal, has been obtained through actual fraud, misrepresentations, concealments or through undue influence, duress, taking advantage of one's necessities or weakness, or through any other similar means or under any other similar circumstances, which render it unconscientious for the holder of the legal title to retain and enjoy the beneficial interest, equity impresses a constructive trust on the property thus acquired in favor of the one who is truly and equitably entitled to the same, although he may never perhaps have had any legal estate therein; and a court of equity has jurisdiction to reach the property either in the hands of the original wrong-doer, or in the hands of any subsequent holder, until a purchaser of it in good faith and without notice acquires a higher right and takes the property relieved from the trust. The forms and varieties of these trusts, which are termed *ex maleficio* or *ex delicto,* are practically without limit. The principle is applied wherever it is necessary, for the obtaining of complete justice, although the law may also give the remedy of damages against the wrong-doer."

In the case of Goodwin v. Tyson, 167 Ark. 396, 268 S. W. 15, this court recognized the right of beneficiaries other than the grantor to maintain a suit for cancellation of a deed after the death of the grantor. In that case a father executed a deed to his only son in consideration of the latter's promise to support the grantor and his wife during their lives and three minor sisters of the grantee during the term of their minority. The court there said: "A fair interpretation of the deed in question is that the beneficiaries named in the deed were not only to be furnished food and shelter and clothing and other physical necessities, but these were not to be provided under condition which made it impossible for them to use and enjoy those necessities in ease and peace, as

was said in Edwards v. Locke, supra, and it would not have been a compliance with the condition of the deed to have furnished these necessities but to have done so under circumstances which rendered the condition of the beneficiaries intolerable." While the right of the beneficiaries to the remedy by cancellation was recognized, they were denied relief because the evidence did not show a failure of the son to render support as required by the deed.

This court is also committed to the rule that where a promise is made to one party upon a sufficient consideration for the benefit of another, the beneficiary may sue the promisor for a breach of the promise. This general principle has been consistently recognized by this court, but our decisions are not in complete harmony as to certain limitations that have been recognized in its application. Mansfield Lbr. Co. v. National Surety Co., 176 Ark. 1035, 5 S. W. 2d 294. See, also, Dickinson v. McCoppin, 121 Ark. 414, 181 S. W. 151 and Freer v. J. G. Putman Funeral Home, Inc., 195 Ark. 307, 111 S. W. 2d 463, where it was held that the obligation of the promisee to the third person must be one that existed at the time of the making of the contract, or one which grew out of the contract itself.

When all the facts and circumstances in connection with the execution of the deed are considered in the instant case, it is clear that Lydia Green was more than a mere third party beneficiary. It is undisputed that Annie Johnson, who furnished the badly run-down property, was in debt and unable to care for herself and that plaintiff furnished the money to discharge the debts and improve the property in order to make it comfortably habitable for all the parties. The amount of money furnished by plaintiff was equal to, if in fact it did not exceed, the value of the property furnished by Annie Johnson in 1944. It was plaintiff's money that made the entire transaction possible and in the eyes of equity she became equally interested with Annie Johnson in the property conveyed to defendants. In these circumstances plaintiff should be treated as a joint owner of the property with Annie Johnson and accorded the same rights

and remedies which were available to the latter as grantor in the deed to defendants. If defendants have breached their contract to maintain and support plaintiff, she is, therefore, entitled to have the deed cancelled and the title to the property vested in her.

There is a decided conflict in the testimony as to whether plaintiff was forced to leave the home on account of intolerable treatment by the defendant, Chester A. Whitney. In urging the insufficiency of the evidence to support the chancellor's finding on this issue, defendant relies on the case of Fisher v. Sellers, 214 Ark. 635, 217 S. W. 2d 331, where we said that "if the grantor voluntarily leaves the home, or refuses the proffered and adequate support and maintenance, without the grantee being at fault, then, during the time the grantor renders performance impossible, he cannot claim that the grantee is violating the contract." It was there held that there was no corroboration of the grantor's testimony concerning the alleged mistreatment by the grantee (daughter).

In the case at bar plaintiff had been ill with diabetes and other ailments for several years. It is true that she left the home in November, 1947, ostensibly for an overnight visit with a friend where she apparently preferred to remain and live on charity rather than return to the household of defendants. According to the testimony of plaintiff and her daughter, the son-in-law frequently cursed and abused both in a manner such as to render it impossible for plaintiff to live in the home in peace and comfort. For more than a year prior to her departure, plaintiff made frequent complaints to her attorney of the abusive treatment. She also made similar complaints to her doctor and the friend with whom she made her new home. There was also evidence that Whitney refused to furnish medical service to plaintiff. This evidence was stoutly denied by Whitney and several witnesses in his behalf. We think it is clear from a consideration of all the evidence that plaintiff's condition was rendered intolerable within the meaning of our cases, and it is immaterial that this condition may have resulted in part from domestic difficulties between the defendants.

We conclude that the able chancellor erred in refusing to grant the relief sought by plaintiff. The decree is accordingly reversed on direct appeal and the cause remanded with directions to cancel the deed to defendants and vest title to the property in the plaintiff, Lydia Green.

HINCH *v.* HINCH.

4-8855 220 S. W. 2d 123

Opinion delivered May 9, 1949.

Hibbler & Hibbler, for appellant.

FRANK G. SMITH, J. Appellee sued appellant, her husband, for a divorce and as grounds for that relief alleged that he had, by his course of conduct long pursued, rendered her condition as his wife intolerable. A decree was rendered upon the grounds alleged, from which is this appeal.

The parties were married June 22, 1920, and for a number of years lived together without unusual discord. They have occupied since their marriage a home owned by appellee. The inception of the discord was the appellant's practice of frequently absenting himself from the home, spending the night away from there, and when appellee would inquire about his absence he would tell her that it was none of her business.

At the time of the trial, from which is this appeal, appellant was between 57 and 60 years old, and appellee admitted that she was 87. Both admitted that they had

ceased to live together harmoniously and appellant attributed this fact to the interference of appellee's daughters, both being about as old as appellant. In addition to her home, the parties owned two other lots, one as tenants by the entirety and the other was owned by appellant individually. The disposition of this property made in the decree is not questioned.

Appellant brought his father, who was an old man of the same age as appellee, to the home, and he resided there for twelve years or more. His presence became objectionable to appellee, as she and her father-in-law did not get along well together, and on one occasion he snatched the dish rag out of her hand while she was engaged in the kitchen. Appellee complained of this and of other officiousness of her father-in-law, but appellant told her that his father was an old man and she would have to endure his conduct as he came first with him. On the other hand, appellant objected to the visits of his wife's two daughters, and one of them ceased to visit her at her home because of appellant's conduct. The other daughter testified that she continued to visit her mother notwithstanding appellant's conduct. This daughter had married and moved to Columbus, Ohio, but had returned home at her mother's request. Appellee gave this daughter a deed to the home, which was duly delivered. Evidently this deed was intended to operate in the nature of and as a substitute for a will, as possession of the deeded property was not taken. The daughter testified that it was her intention to take care of her mother, and that she was there for that purpose.

Relations between appellant and appellee became more strained after he learned of this deed and he continually fussed with and quarreled at appellee, who was in feeble health and who, after the most severe of these quarrels, would have nervous spells which would confine her to her bed, and the testimony of relatives, including a nephew, was to the effect that appellant was indifferent to his wife when she was ill and unsympathetic with her.

Appellee was a fortune teller, and called herself a consultant, from which employment she earned money,

which she contributed in part to the support of the household, and acquired the town lots above referred to.

The discord culminated when someone took from appellee $1,400 in cash which she had concealed in her room. She called officers of the law, who made investigation, and although she suspected appellant of having taken her money, she refused to have him arrested, saying to the officers that she and her husband would talk the matter over. She testified that she and appellant did talk the matter over and that he returned $300 of the money and promised to repay the balance in monthly installments, but that after making a few payments as agreed, appellant refused to continue the payments. All of this appellant denied.

The money was never recovered except the payments made as above stated. At any rate, the relations of the parties became more strained and according to appellee, appellant became more acrimonious in his dealings with her, and her testimony, corroborated by members of her family, was to the effect that after these quarrels appellee would have nervous spells which confined her to her bed.

All of this appellant denied, his testimony being to the effect that he was not only considerate, but was an indulgent husband, and that he contributed his earnings to the upkeep of his household and that his quarrels with his wife were precipitated by the interference of her children and members of her family, and that he and his wife got along harmoniously when they were not around.

There are conflicts in the testimony in regard to matters stated which cannot be reconciled, but the recitals of the decree indicate the finding that appellee's version of their relationship was accepted as true, and that because of appellant's conduct appellee's condition as appellant's wife had become intolerable.

Appellee's right to the divorce is the only question raised in appellant's brief, and we think the preponderance of the testimony supports the findings of the decree which is accordingly affirmed.

SUTTON *v.* FORD.

4-8883 220 S. W. 2d 125

Opinion delivered May 9, 1949.

Warren E. Wood and *Griffin Smith, Jr.*, for appellant.

Robinson & Park, Thad Tisdale, Talley & Owen and *Robert L. Rogers,* for appellee.

GEORGE ROSE SMITH, J. The appellant and John Jefferson, who were divorced in 1938, owned a lot in North Little Rock as tenants by the entirety. The appellees are Lewis and Jessie Ford, W. I. Stout and John Jefferson. The case arises from appellant's attempt to sell the property to the Fords and from her transfer of their purchase money note to Stout.

The divorce decree did not purport to affect the couple's joint ownership of the property. Jefferson lived on the land for a year or two after the divorce was granted, but his occupancy ended when the house burned completely. Appellant had acquired a tax deed from the State, and according to her testimony she and her second husband then proposed to build another house on the lot. She says that Jefferson disclaimed any interest in the property and told her to do whatever she wanted to with it. Jefferson denies that he made any such disclaimer of his interest in the lot.

Appellant and her second husband did build a new house on the lot and occupied it from 1944 until 1948. Appellant then contracted to sell the property to the Fords for $2,100, of which $600 was paid in cash and the balance was evidenced by a promissory note payable in monthly installments. The note recited that it was executed in connection with and was made a part of the contract to sell the land. The effect of this provision was to burden the note with the terms of the contract and thus to destroy negotiability. *Trice* v. *People's Loan & Investment Co.,* 173 Ark. 1160, 293 S. W. 1037.

When the Fords went to the house to take possession they found that it was occupied by John Jefferson, who had moved in when the appellant and her second husband vacated the house. The appellant and the Fords then consulted an attorney not now in the case, who gave appellant an opinion stating that she had good title to

the property and was entitled to sell it. On the faith of this opinion Stout bought the installment note from the appellant for $1,000. The transfer was by delivery only, without indorsement.

The Fords consulted another attorney and learned that appellant's tax title was not valid as against her first husband and that she did not have merchantable title to the land. They then brought this suit to obtain cancellation of the note and contract and to recover the sum of $726 which they had paid to appellant. The chancellor granted this relief and also gave Stout a judgment against appellant for the $1,000 he had paid for the note. Jefferson and appellant agreed in open court that the property might be sold, and the decree directed that half the proceeds of sale be paid to Jefferson and that the other half be applied first in satisfaction of the Fords' judgment and then toward the payment of Stout's judgment. There was also a provision as to appellant's present homestead which will be discussed later on.

Appellant insists that she is not liable to the Fords for the reason that her contract with them did not require her to deliver a warranty deed. In this respect the contract provides that upon completion of the payments the appellant will execute a deed warranting title against all claims arising through or under her. Appellant's theory is that Jefferson's outstanding interest would not have been a claim covered by the terms of her special warranty. But that question is beside the point as long as the contract is still in the executory stage. Appellant bound herself to convey the land to the Fords, and in the absence of any exceptions in the agreement her obligation was to deliver merchantable title. Until a deed is accepted by the purchasers, they are entitled to rescission upon a showing that the vendor's title is not marketable. *Yeates* v. *Pryor*, 11 Ark. 58, 75-76.

Appellant seeks also to escape liability to Stout and relies upon the fact that she did not endorse the note when she sold it to him. The note, as we have seen, is nonnegotiable; so Stout took subject to the Fords' defenses against appellant. Since they undoubtedly have

a good defense to the obligation, Stout in fact acquired a worthless piece of paper instead of an enforcible demand. Thus there was a total failure of consideration, entitling Stout to rescind the transaction and recover the money paid by him to appellant. *Tri-State Const. Co.* v. *Watts,* 152 Ark. 110, 237 S. W. 690.

We are asked to limit John Jefferson's share of the proceeds of sale to one half the value of the vacant lot rather than one half the entire proceeds of sale. If appellant's testimony as to his abandonment of his interest in the property were undisputed it might be possible to work out an estoppel against Jefferson's claim to an interest in the improvements made by appellant and her husband. But Jefferson denied having disclaimed his interest, and the chancellor elected to accept his testimony rather than the appellant's. Too, Jefferson did not have to agree to a sale of his interest in the land, and he did so upon the understanding that he would receive half the proceeds. Without his cooperation the appellant's interest alone could have been sold, and in view of Jefferson's possible survivorship it is unlikely that her interest would have brought a fair price if sold separately. We cannot permit appellant to take advantage of Jefferson's cooperation by varying the agreement by which he acquiesced in the sale.

Appellant's final contention, however, is meritorious. It was shown that a substantial part, if not all, of the money she received from the Fords and Stout was used by her in the purchase and improvement of her present home in Little Rock. The chancellor followed these funds into the property and gave the Fords and Stout a lien to secure any part of their judgments remaining unsatisfied after the sale of the North Little Rock property. This was error. While it is true that a purchase money lien may be asserted against a homestead when the loan is obtained for the specific purpose of buying the property, that principle does not apply here. The Fords advanced money to appellant for the purpose of buying the North Little Rock house and lot, and Stout advanced money for the purpose of buying

the note. Even though they all were told by appellant that she intended to use the money to buy a home, that was merely an incidental matter. This situation is more like that in which a loan is made for general purposes and is in fact used to acquire a homestead. We have held that the lender does not then have any recourse against the property acquired with the money lent. *Starr* v. *City Nat. Bank,* 159 Ark. 409, 252 S. W. 356.

Appellees urge us to uphold the chancellor's action upon the theory that the debt is owed by appellant in the capacity of a trustee, so that the homestead exemption is inapplicable. No trust relationship existed, however. We cannot impose a constructive trust, for appellant's conduct was not fraudulent. She believed that she owned the property and had her former attorney's opinion to that effect. Nor was there an express trust. Although two or three of our earlier cases indicated that a vendor holds title to the property in trust for the vendee, it is now firmly established that their relationship is in substance that of mortgagor and mortgagee, just as if a deed had been delivered and a mortgage executed to secure the unpaid balance. These cases are analyzed in Rest., Trusts, Ark. Anno., § 13. Hence the appellees' judgments are for mere breach of contract, against which the homestead exemption must be recognized.

That part of the decree fixing a lien upon appellant's present home is reversed; in other respects the decree is affirmed, with costs to the appellees.

Griffin Smith, C. J., not participating. McFaddin, J., dissents in part.

Ed. F. McFaddin, Justice (dissenting in part). I dissent from so much of the majority opinion as allows John Jefferson to receive one-half of the proceeds of the sale of the house and lot. At most, he is entitled to only one-half of the proceeds of the sale of the vacant lot.

Willie Mae Sutton testified that John Jefferson told her that she could build a house on the lot, free of any claim by him; and she did build the house, relying on

Jefferson's statement. Certainly Jefferson—after making such a representation (which I find he made)—should be estopped from receiving one-half of the sale price of the house. Limiting Jefferson to one-half of the proceeds of the sale price of the vacant lot will (1) prevent him from being unjustly enriched, and (2) give the Fords a greater amount of security for recovery on their judgment against Willie Mae Sutton; and both of these results are highly equitable.

FRANK LYON COMPANY *v.* SCOTT.

4-8831 220 S. W. 2d 128

Opinion delivered May 9, 1949.

John M. Lofton, Jr., and *Owens, Ehrman & McHaney,* for appellant.

Buzbee, Harrison & Wright, for appellee.

GEORGE ROSE SMITH, J. The circuit court affirmed a Workmen's Compensation Commission order awarding compensation to the appellee as the widow of Robert H. Scott. The Commission found that Scott's exertions in carrying a heavy tool kit and welding torch to the second floor of his employer's place of business had caused hemorrhages that led to his death on May 20, 1947. The appellants—Scott's employer and insurance carrier—contend that there was not sufficient competent evidence to sustain the award.

We think the finding that Scott did carry the tools upstairs is supported by substantial evidence. Scott was a refrigerator repairman whose duties included working at the plant and the making of outside service calls. On the morning of April 28 Scott's immediate superior, B. J. Roberts, told him which work was urgent. Scott replied that he would have to get his tools and went downstairs. The weight of the tool kit and welding unit is about one hundred pounds. Ordinarily Scott would have used the elevator, but it was not in operation that morning. Roberts did not actually see Scott ascend the stairs, but he testified that he heard the tool kit rattling as Scott made the ascent. There was also evidence that the tools were customarily kept in the truck assigned to Scott and that they were found at his place of work on the second floor shortly after his seizure. This testimony was corroborated by appellee's statement that her husband later told her about carrying the tools upstairs. See Ark. Stats. (1947), § 81-1327. This evidence is sufficient to support the Commission's conclusion on this disputed point.

About ten minutes after Scott returned to the second story Roberts heard a noise and discovered Scott lying on the floor in a semi-conscious condition. He was taken to the hospital and remained there two days, his malady being diagnosed as a subarachnoid hemorrhage. After his discharge from the hospital Scott remained at home until he suffered a second attack on May 14. He was returned to the hospital and died there on May 20. An autopsy revealed a small subarachnoid hemorrhage, two or three weeks old, and a massive cerebral hemorrhage to which death was attributed. It was not possible to tell if the hemorrhage of May 14 had continued until Scott's death or if there had been a third hemorrhage on May 20.

It cannot be said that there is no substantial evidence to show that the hemorrhages were caused in part by Scott's activity in carrying the tools. The three doctors who testified agreed that Scott had a congenital weakness in certain blood vessels and that a hemorrhage would have occurred eventually in any event. In view of

the congenital defects it might have happened spontaneously, even while the patient was lying in bed asleep. But all three physicians stated that the effort expended in climbing the steps with the tools could have precipitated the series of hemorrhages, and one of them was of the opinion that this exertion did in fact cause the hemorrhages. This testimony brings the case within our holding that compensation is payable when the employee's work so affects an existing condition that injury or death occurs sooner than would otherwise have been the case. *McGregor & Pickett* v. *Arrington,* 206 Ark. 921, 175 S. W. 2d 210.

Affirmed.

CITY OF FORDYCE *v.* DUNN.

4-8848 220 S. W. 2d 430

Opinion delivered May 9, 1949.

Rehearing denied June 6, 1949.

[redacted]

Thomas E. Sparks, for appellant.

Thomas B. Adams and *A. Mack Rodgers,* for appellee.

GRIFFIN SMITH, Chief Justice. In 1943 the City of Fordyce enacted an ordinance designed to regulate garages, filling stations, and bus or truck depots. Section 3 of the ordinance requires that a permit be procured as a condition precedent to the right to build a structure for any of the uses mentioned, or for converting an existing structure to such use. Violation is a misdemeanor punishable by fine not to exceed $50, each unauthorized day of operation being a separate offense.

Mrs. Fay Clyde Dunn owns a lot on Fourth and Graham streets, and in June 1948 filed with the Recorder her request for permission to construct and operate a filling station on the property. When the application was presented to the City Council, the Recorder was directed to publish notice that a hearing would be had June 28. By unanimous action of all Councilmen who participated the application was denied. Alderman Leroy Turner did not vote.

This appeal is from a Chancery Court decree enjoining the Council from enforcing the ordinance as to Mrs. Dunn, and authorizing her "to construct, as she sees proper, a filling station on the property in question."

The Chancellor expressly found that the Council had acted honestly and in good faith, "with the public interest in mind," and in response to its best judgment, but had exceeded its authority "under this ordinance."

It will be observed that the Court did not hold the ordinance void. The opinion seems to have been that, granting the City's right to regulate, power was lacking under the ordinance to prohibit erection of the building in the circumstances disclosed by the proof.

A City's right to promulgate and enforce ordinances of the tenor here questioned was sustained in *Van Hovenberg* v. *Holman,* 201 Ark. 370, 144 S. W. 2d 718. In essentials the controversy presents facts similar to those discussed in the Holman case, one distinction being proof relating to character of the area in question —whether residential or business property. Van Hovenberg relied on an ordinance requiring a permit before constructing or operating a filling station. In holding that the power derived from §§ 9543 and 9589 of Pope's Digest, irrespective of zoning regulations, it was said that public policy of Texarkana was expressed in the ordinance. In reviewing reasons for holding the ordinance enforcible, this Court said: "The prohibition against erecting and operating filling stations without permission was a regulation within the City's police power, intended for the benefit of all. Many factors are involved. The use of gasoline, oils, and other inflammables creates fire hazards which the City may regulate. Whether a particular community, (suitable, preferentially, as a residential district) shall be invaded by construction and operation of a filling station is a matter which, under State laws, may be regulated, even though the station, *per se,* is not a nuisance."

In his summation of issues in the case at bar, Judge Haynie commented: "I believe this property is just across the street from another filling station, and [the application for a permit] should not be considered entirely on the ground of residential interests. From all of the testimony and circumstances shown, the building up of Fordyce will probably extend westward."

Whether location of the filling station on the lot owned by appellee would be a well-disposed transaction in respect of City interests was a matter to be determined by the municipality's governing body; and unless an abuse of discretion be shown, Courts will not arrest its acts. See McQuillin on Municipal Corporations, Vol. 1, § 380, (2d Ed. rev., p. 1068).

In *Herring* v. *Stannus,* 169 Ark. 244, 275 S. W. 321, the same principle as that presented in the instant ap-

peal was discussed in upholding the Little Rock City Council's action in granting a filling station permit in a zoned area. The presumption was indulged that the Council, in exercising the power conferred upon it, had acted "in a fair, just, and reasonable manner. . . . [Because] conditions vary in different portions of an area, . . . if any discretion is to be exercised, that right must be vested in some one, and no more appropriate agency for that purpose could be constituted than the Council of the City, where the duty and the authority to pass upon the question [were] vested".[1]

So here, the question being one involving discretion, and the Council having acted on a record showing sharp differences of opinion, and the Chancellor having found that it acted in the utmost good faith and that the unanimous vote of all who participated was in response to the better judgment of each, the act must stand unless the Council, in changed circumstances, should again consider the matter.

The decree is reversed.

SMITH *v.* GRIMSLEY.

4-8871 220 S. W. 2d 428

Opinion delivered May 9, 1949.

Rehearing denied June 6, 1949.

[1] The opinion, written by Mr. Justice FRANK G. SMITH, contained the further statements that "This was a question about which reasonable minds might differ, and did differ sharply as reflected by the testimony in the case, and the ordinance constituted the Council as the tribunal to pass upon this question. . . . [Discretion to approve or reject the petition], in so far as discretion abides, is vested in the City Council, charged by law with the duty of passing on the question, and does not rest in the Courts which review the Council's actions."

Smith & Smith, for appellant.

Jeff Duty, for appellee.

Ed. F. McFaddin, Justice. On February 2, 1940, W. W. Smith and N. E. Smith, his wife, for money borrowed, executed to J. T. Grimsley their joint and several promissory note for $477.50 *due one day after date.* The present suit, for recovery on said note, was filed by Grimsley on April 1, 1947. Chancery jurisdiction was because of equitable garnishment. W. W. Smith died after the suit was filed, and his administrator was a party in the lower court. N. E. Smith (the only appellant here) pleaded the statute of limitations as one of her defenses. The Chancery Court found against her on this plea, and the correctness of that finding is the sole question on this appeal.

At the outset we state certain general rules:

1. The statute of limitations applicable to a promissory note is five years after maturity, as fixed by § 8933, Pope's Digest, and § 37-209 of Ark. Stats. of 1947. Part payment, before the bar attaches, forms a new point from which the statute will begin to run. Less v. Arndt, 68 Ark. 399, 59 S. W. 763. See, also, other cases collected in the note following § 37-218 of Ark. Stats. of 1947.

2. Part payment of a debt by one joint and several debtor *before the bar of the statute of limitations will* bind the other debtor. Fendley v. Shults, 142 Ark. 180, 218 S. W. 197.

3. Part payment by one of the joint and several debtors *after the note is barred* does not revive the debt as to the co-debtor, who has made no such payment. Slagle v. Box, 124 Ark. 43, 186 S. W. 299.

4. When the statute of limitations is pleaded by the defendant, and a part payment is relied on by the plaintiff to interrupt the statute of limitations, then the burden is on the plaintiff to prove that part payment was made at such time as would interrupt the running of the statute. Taylor v. White, 182 Ark. 433, 31 S. W. 2d 745.

5. When part payment is pleaded to interrupt the running of the statute, then the person so pleading must show the part payment to have been made *in fact* at a time that would interrupt the statute. Mere endorsement of the payment on the note is not sufficient proof. Johnson v. Spangler, 176 Ark. 328, 2 S. W. 2d 1089, 59 A. L. R. 899; Bank of Mulberry v. Sprague, 185 Ark. 410, 47 S. W. 2d 601.

The application of the five foregoing and well-established rules necessitates a reversal of the decree in the present case, because the date of the alleged partial payment was never shown by any proof. Only two witnesses testified regarding such part payment. One was the plaintiff, J. T. Grimsley; and the following is his entire testimony on this point: "Q. What is the date of the note? A. February 2, 1940. Q. Has this note been paid? A. No, sir. Q. Has Mrs. N. E. Smith paid anything? A. No, sir. Q. How much was ever paid on this note to you? A. One dollar to renew the note. Q. I believe you said this defendant, Mrs. Smith, never paid anything? A. Mrs. Smith never paid anything, but Mr. Smith did."

The note was introduced in evidence, and it bore this notation on the reverse side: "November 2, 1944, paid $1.00 on note to renew." It must be remembered that J. T. Grimsley never testified that the payment was made

on November 2, 1944. All that his testimony shows is that W. W. Smith paid $1.00 "to renew." The date of the payment was never stated by this witness.

The only other witness testifying as to the part payment was Mr. Lindsey. He said, as to a conversation he had with W. W. Smith: "Q. You say you had a conversation with him about this note? A. Yes, sir. Q. State whether or not he told you that he had made a payment on the note? A. Yes, a dollar on it. . . ."

Even if Mr. Lindsey's testimony was competent (a matter not necessary to be decided), still Mr. Lindsey did not attempt to fix the date of the payment on the note. So there is no testimony to show the date that the alleged payment was made.

In order to hold the appellant, N. E. Smith, liable on the note as against her plea of limitations, the burden was on appellee, Grimsley, to show that the payment was made before February 3, 1945. This burden was not discharged; so we necessarily hold that the appellee failed to overcome the plea of limitations. The decree of the Chancery Court is reversed, and the cause is remanded with directions (a) to release the impounded funds and (b) to enter a decree in accordance with this opinion.

RORIE *v.* STATE.

4559 220 S. W. 2d 421

Opinion delivered May 9, 1949.

Rehearing denied June 6, 1949.

Lawrence E. Dawson, for appellant.

Ike Murry, Attorney General and *Jeff Duty, Assistant Attorney General,* for appellee.

Ed. F. McFaddin, Justice. On a plea of guilty, the jury convicted the appellant of murder in the first degree, and assessed the death punishment; and this appeal is an effort to obtain a reduction in the sentence.

The facts are sordid. Appellant had been estranged from his wife, Mrs. Gertrude Rorie. On the night of October 8, 1948, he went to her home when she was alone with her two small children. When she refused to become reconciled with him, he struck her on the head with a hammer, and either killed her or knocked her unconscious. Then he sprinkled kerosene over the bed where she and her two sleeping children were lying. He set fire to the bed and departed. The children were Frankie Maupin, aged 11, and Joyce Maupin, aged 9, being stepchildren of appellant. As he left the premises he heard the children scream; as he reached his truck a few hundred feet away, he saw the entire house in flames: but he drove to his home and retired for the night. Mrs. Rorie and her two children were burned to death. Only the skulls and bones remained the next morning after the fire, but these were properly identified.

Appellant was arrested on the morning of October 9th. He promptly confessed, and gave the officers his clothes and the hammer, all of which showed human blood stains. He identified the container from which he had poured the kerosene. In short, his confession was freely made, and amply corroborated. He was tried on information which charged him with murder in the first de-

gree for the killing of the two children, done while he was perpetrating the crime of arson. Appellant duly entered his plea of guilty, and the Circuit Court empaneled a jury to examine the testimony and find the degree of the crime and fix the punishment. The learned Circuit Court followed the statutes and our cases covering such a situation. See §§ 4041-2, Pope's Digest (§§ 43-2152 and 43-2153, Ark. Stats. of 1947), and these cases: Lancaster v. State, 71 Ark. 100, 71 S. W. 251; Wells v. State, 193 Ark. 1092, 104 S. W. 2d 451; Ray v. State, 194 Ark. 1155,[1] 109 S. W. 2d 954; Carson v. State, 198 Ark. 112, 128 S. W. 2d 373; and Jones v. State, 204 Ark. 61, 161 S. W. 2d 173.

The cause was tried to the jury just as though the defendant had pleaded not guilty. Every essential fact of the crime was established. The jury was instructed on the degrees of murder and the discretion as to the

[1] Not reported in full in the Arkansas Reports.

punishment. The verdict is in the form required by law. It reads: "We, the jury, find the defendant guilty of the crime of murder in the first degree as charged in the information and fix his punishment at death in the electric chair."

In capital cases we not only consider each assignment, but we also examine the transcript for each objection made by appellant, See § 4257, Pope's Digest, (§ 43-2723, Ark. Stats. of 1947), and see, also, Bates v. State, 210 Ark. 1014, 198 S. W. 2d 850.

After having studied all of the assignments and all of the objections, we specifically hold:

1. The motion for continuance was properly refused.

2. There was no error in the Court's ruling relative to the opening statement of the prosecuting attorney.

3. The evidence is sufficient to sustain the verdict.

4. The trial court ruled correctly on each of the eight objections relating to the admissibility of evidence.

5. Each of the nine instructions given by the Court was correct, and—together with one unnumbered instruction—they covered all phases of the case.

6. The Court ruled correctly in refusing each of the nine instructions requested by appellant, since such requested instructions were either incorrect, or had been covered by correct instructions given.

7. In addition, the record reflects that shortly after the arrest, the trial court on its own motion had appellant's sanity ascertained.

In the brief the attorney for appellant makes a strenuous argument against capital punishment. Our statutes (§ 4042, Pope's Digest, § 43-2153, Ark. Stats. of 1947) allow the jury to assess the death penalty; and the amending of the statutory law is a matter for the Legislature, rather than the Courts.

Finally, appellant's counsel asks this Court to "exercise its constitutional power and reduce the death sentence to life imprisonment." Among other cases, we are cited to Blake v. State, 186 Ark. 77, 52 S. W. 2d 644, in which case this Court modified the judgment from the death sentence to imprisonment. When this Court finds that the evidence is insufficient to support the punishment assessed, then we have the power to modify the punishment. Our cases clearly reflect, however, that this modification is done, not on a basis of judicial clemency, but only in a case in which the evidence would not sustain the higher punishment assessed. In the case at bar we find the evidence sufficient to support the jury verdict.

Therefore, the judgment is affirmed.

CORTIANA *v.* KANSAS EDUCATION ASSOCIATION.

4-8875 220 S. W. 2d 598

Opinion delivered May 16, 1949.

Rehearing denied June 13, 1949.

[redacted]

Rex W. Perkins, James W. Ellis, William C. Jenkins and *J. R. Crocker,* for appellant.

Lee Seamster and *Atkinson & Atkinson,* for appellee.

FRANK G. SMITH, J. Appellant filed this suit to enforce the specific performance of an alleged contract to purchase a tract of land. A demurrer to the complaint was sustained, from which decree is this appeal.

The case is a continuation of the litigation reported in the case of Cortiana v. Franco, 212 Ark. 930, 208 S. W. 2d, 436.

The facts alleged in the complaint, as constituting the cause of action, most of which are recited in the opinion above referred to are as follows. The Kansas Educational Association of the Methodist Church, acquired by assignment to it, two mortgages on the land in question, executed by Cortiana and his wife, and as the

basis of this suit is certain letters which passed between the managing officer of the Association and Cortiana, we copy them in full. The first of these letters reads as follows:

"January 19, 1933.

"In re: Cortiana Loan No. 14148

"Mr. D. Cortiana

Springdale, Arkansas.

"My dear Mr. Cortiana:

"I am in receipt of your letter of a few days ago relative to the foreclosure of your loan. I note that you prefer that this should not be done inasmuch as you thought it would hurt your credit. I note further that you would like to have the privilege of going ahead just as you now are, and that you would pay us first.

"In reply will say that I know this matter has been a source of a great deal of worry to you people, as it has also to us. I wish also to say that we certainly do not wish to do anything that we do not think is for your best interests as well as for ours. I feel however, as stated to you in my letter 7 that the safest thing both for you and for us is for us to proceed to take title under our foreclosure judgment. As stated to you while we were there, I do not believe this means at all that you will be put out of your home. I do not believe anyone will pay or bid, the amount that we have in the property, and that means that the property will be bid in for us and we will take title. Then, as stated to you in a previous letter, we would be more than glad to either rent the property to you under proper lease, or sell the same back to you as soon as you can get clear of your other creditors, and thence as soon as it can safely be done, under a proper contract. We do not want the property, and would much rather sell it back to you again. This plan, however, would prevent other creditors stepping in and making claim to your entire crop as they did last year. It is true that it was not your fault that this happened last year, but was the fault of the Shartel Mortgage Company.

Nevertheless, there is nothing to prevent these other creditors from running an attachment again this coming summer, and I think, therefore, that this plan is much the safer. May I say further that I do not believe that this plan will in any way affect your credit nor your ability to continue to operate your plant and canning factory as you have heretofore. In fact, I am not sure but that it may help, because those from whom you buy in the future will be more assured that your old creditors cannot step in and run attachment for your old debts, thus taking your whole crop. I hope, therefore, that you see this matter as I do and that you do not worry about the matter, because we are only trying to do what it seems to us is best for both of us. As I have already said, I see no reason why you should not continue to retain possession of your home and regain title under a re-purchase agreement as above indicated.

"With kindest personal regards to yourself and family, I remain

"Yours truly,

"F. E. Wolf,

"Treasurer".

The mortgages were foreclosed and the Association became the owner of the land and for a number of years the Cortianas continued in possession as tenants under annual rental contracts. A note for the rent for the year 1946 was given and upon default in its payment an action of unlawful detainer was filed. The Cortianas answered and alleged that they were in possession under a contract to purchase the land, but that notwithstanding this contract the Association had sold the land to one Smith, who in turn sold and deeded it to one John Franco and Albert Pellin and these persons were made parties, it being alleged that they had purchased with the full knowledge of Cortiana's possession and of his claim of the right to possession under a contract of purchase.

It was held in the case above cited that the Association had made proper and sufficient proof of all facts required and necessary to maintain the action of unlaw-

ful detainer, to-wit: Their possession as landlord, a contract of rent, unpaid rent and demand for possession. It was held that defendant Cortiana could not convert that action into a suit for specific performance, but that he might bring a separate suit to obtain that relief, which he later did, and this appeal is from the decree of the court sustaining a demurrer praying that relief.

The opinion in the unlawful detainer suit was delivered February 16, 1948. The managing officer of the Association wrote Cortiana the following letter:

"July 8, 1946

"Mr. D. Cortiana
Springdale, Arkansas

My dear Mr. Cortiana:

"I am writing this to advise that our Committee feels that some definite change will need to be made in the handling of our above property before another year. You know that we have been trying to hold the place for you so that you could buy it, and have been renting it to you at less than a normal rental figure. Our committee feels that this cannot continue any longer. As you know also prices of everything else are advancing very rapidly and this includes not only the price of land and houses but also rent. You should, therefore, make your very definite plans to buy the property this fall or be prepared to pay at least twice the amount of rent you are now paying. May I say, however, that I think it would be much better for you to get your finances in shape to buy the property. You have always indicated that you wanted to repurchase the property and we have tried to hold it for you. We have had offers to sell and now have a definite offer for the buying of this place. I doubt, if I can hold our committee off much longer. If, therefore, you are interested in trying to buy it, I think, you should make definite arrangements about the matter. I should also add that I am sure our Committee would not be willing to sell it for less than $5,500. They would be willing to make terms, but I feel sure that they would expect at least $1,500 paid down at the time the deal is

closed. I wish, you would give this matter your very serious consideration and advise me as I would like to know how to answer the other party who is interested in buying. If you wish to try to buy, I will prepare one of our regular Offer to Purchase Blanks somewhat along the above lines and send it down for your approval and signature. You understand that after the $1,500 is paid, we would be willing to carry mortgage back for the balance with annual reduction payments. Please let me hear from you.

"Yours very truly,
"F. E. Wolf".

In reply to this letter Cortiana wrote the Association the following answer:

"Springdale, Arkansas
"July 15, 1946

"Dear Mr. Wolf:

"In regard to your letter of July 8, we are positively doing everything possible to buy our place. Mr. Wolf, we know you realize how awfully hard we have always tried and as the odds seem to have always been against us we have not had a chance to buy. However, this year things seem pretty well to be in our favor and therefore, we are positively going to make a definite plan agreeable to both of us to buy back our property.

"Mr. Wolf, we have a good crop this year, as you know the grape harvest will not begin until the third or fourth week in August we are unable to make a definite decision at the present, therefore, no later than October 1st we will be in a position to make this settlement that we are both so very anxious to make agreeable for all concerned.

"R-1 Box 115
"Springdale, Ark.

"Yours truly,
"D. G. Cortiana."

The three letters herein copied were made exhibits to the complaint filed by Cortiana and are relied upon as constituting his cause of action.

It appears from the letter dated January 19, 1933, that it was contemplated that Cortiana would repurchase the land and that until he had done so he would remain in possession as a tenant, paying an annual rent, he had made no attempt to exercise the right to repurchase the land when the letter dated July 8, 1946, was written. This letter advised that the committee of the Association having the matter in charge, had decided that they could no longer hold the transaction in abeyance as they had a definite offer to purchase the land from a purchaser who was awaiting an answer. A minimum price for the land and a minimum cash payment was suggested.

Cortiana did not accept this offer, on the contrary he stated that he "was unable to make a definite decision at the present", but stated that no later than October 1st following, he would be in a position to make a settlement that would be satisfactory to all parties. Just what settlement that would be was not stated. Cortiana did not say he would pay the price demanded. It was certain, therefore, that no contract was made for the sale of the land, and there was therefore no contract, the specific performance of which could be enforced.

We have many times held that the courts will not make contracts for the parties, and that the specific performance of a contract will not be enforced where the parties have not agreed upon the essential details, the most recent case to that effect being that of Wyatt v. Yingling, 213 Ark. 160, 210 S. W. 2d 122.

After the receipt of Cortiana's letter above copied, dated July 15, 1946, in which he stated that he was "unable to make a definite decision at the present", the Association accepted an offer to purchase, of which they had advised Cortiana in the letter dated July 8, 1946. And on or about July 26, 1946, a contract was entered into between the Association and Smith whereby the land was sold to Smith, who conveyed to his co-defendants John Franco and Albert Pellin.

After this contract and sale, Cortiana offered to comply with the terms offered him for the purchase of the land, but it was then too late as the offer was not

made until after the contract with the sale to Smith had been made.

The complaint supplemented by the exhibits thereto does not allege the existence of a contract between the parties, and the demurrer was therefore properly sustained.

PTAK *v.* JAMESON.

4-8814 220 S. W. 2d 592

Opinion delivered May 16, 1949.

Rehearing denied June 13, 1949.

Rex W. Perkins and *O. E. Williams,* for appellant.

Lee Seamster, Tom Pearson, Virgil Ramsey and *J. S. Jameson,* for appellee.

FRANK G. SMITH, J. Appellant Ptak and appellee Jameson were opposing candidates for the nomination of the Democratic party for the office of Municipal Judge for the City of Fayetteville in the primary election held in that city February 24, 1948. The returns of the election as canvassed by the party committee, gave Jameson 975 votes, and Ptak 910 and Jameson was certified as the party nominee.

Thereafter Ptak filed an election contest alleging that many illegal votes had been cast for Jameson, and that he, Ptak, had received a majority of the legal votes cast. Numerous motions were filed during the progress of the trial and these, with the answer filed by Jameson, raised the issues herein discussed.

The validity and verity of the official list of persons who had paid poll taxes were questioned, but the court held that while there were some irregularities in its prep-

aration and publication, it had been prepared and published in substantial compliance with the law. The accuracy of the list was not questioned and it became the basis of this contest. We approve the holding of the court in this respect.

One of the motions filed was to dismiss the Ptak contest on the ground that he had violated the law by opening the box containing the ballots and returns from Ward No. 4 of the city. There were four wards in which elections were held. The testimony in this respect appears to be that the chairman of the Democratic Committee under whose auspices the election had been ordered and held, had opened the ballot boxes and extracted the poll books and delivered these books to Ptak, who was near, but not actually present when the box was opened. The contention is that this action rendered Ptak ineligible to contest the election under § 4743, Pope's Digest, as being a violation of the law which destroyed the presumption of the integrity of the returns of that box. The court overruled this contention upon the ground that Ptak was not present, and did not participate in the opening of the box, but it was evidently done at his request and for his benefit. This action was highly improper, indeed was unlawful, § 4822, Pope's Digest, and *prima facie* would destroy the integrity of the returns from that box. Dodd v. Gower, 187 Ark. 717, 62 S.W. 2d, 1. However, it was affirmatively shown that the only thing done was to extract the poll books and the ballots themselves were not disturbed, nor was it contended that there had been any mutilation or alteration of the poll books. We therefore affirm the ruling of the court in this respect.

After much testimony had been heard, Ptak filed an amendment to his complaint alleging that a number of electors whose right to vote had been challenged on other grounds, had failed to properly assess and were not qualified electors for that reason. This motion to amend the complaint to contain this additional allegation was filed April 14th, and was overruled as stating a ground of contest not alleged in the original complaint. We

affirm this action. We have held that in an election contest the contestant cannot, after the expiration of the time for filing the contest, amend his complaint so as to set up a new cause of action, but that he may amend his complaint to make it more definite and certain as to any charge in the original complaint, and that the refusal to allow contestant to file an amendment setting up a new ground of contest was proper when the time for filing an amendment had expired. Winton v. Irby 189 Ark. 906, 75 S.W. 2d, 656; Nelson v. Gray 190 Ark. 179, 77 S.W. 2d, 968.

A large number of students of the University, located in Fayetteville, voted at the election and the great majority of these voted for Jameson. Ptak challenged 170 votes on the ground of non residence of the voters, most of which votes were cast by students at the University. Of the 170 thus challenged 104 were challenged on the additional ground that they were not on the certified list of voters and did not present the "other evidence" required by § 4745, Pope's Digest, of their right to vote. The names of the 104 persons referred to appear on what was made as Exhibit "N" to the testimony offered in Ptak's behalf.

Defendant Jameson began the examination of persons whose names were on this Exhibit "N" and examined 18 of these and had 20 others present for examination when the parties entered into a stipulation reading as follows:

"It is understood and agreed by and between counsel for the plaintiff and for the defendant that all witnesses appearing on Plaintiff's Exhibit "N" would testify to the same statement of facts as the eighteen witnesses put on by the defense this morning."

The 18 witnesses examined before this stipulation was filed testified that they did not file poll tax receipts or certified copies thereof with their ballots. They were also examined as to their legal residence and the court found that 4 of the 18 examined were legal residents and counted their votes which were cast for Jameson, to

which action Ptak duly excepted. Later in the trial Ptak proposed to examine others on this Exhibit "N" as to their qualifications and right to vote in addition to the manner in which they had voted.

There was evidently a misunderstanding as to the purpose and effect of this stipulation and the court held that further inquiry into the competency of persons whose names appeared on Exhibit "N" and had not been examined was concluded by the stipulation. This ruling is defended upon the ground that the court construed the stipulation as covering all questions of eligibility, except that of substantial compliance with § 4745, Pope's Digest.

This section deals with the subject of "Evidence of right to vote." It provides that: "No person shall be allowed to vote at any primary election held under the laws of this State, who shall not exhibit a poll tax receipt, or other evidence that he has paid his poll tax within the time prescribed by law to entitle him to vote at the succeeding general State election. Such other evidence shall be: (a) A copy of such receipt duly certified by the clerk of the county court of the county where such tax was paid; Or (b) such person's name shall appear upon the list required to be certified to the judges of election by § 4696. Or, if any person offering to vote shall have attained the age of twenty-one years since the time of assessing taxes next preceding such election * * * and possesses the other necessary qualifications, and shall submit evidence by written affidavit, satisfactory to the judges of election, establishing that fact, he shall be permitted to vote. All such original and certified copies of poll tax receipts and written affidavits shall be filed with the judges of election and returned by them with their other returns of election, and the said judges of election shall, in addition to their regular list of voters, make an additional list upon their poll books of all such persons permitted by them to vote, whose names do not appear upon the certified list of poll tax payers, and such poll books shall have a separate page for the purpose of recording names of such persons."

The certified list of persons who have paid poll taxes is *prima facie* evidence of their right to vote, but there are other qualified electors whose names do not appear on this certified list, and the section just referred to and quoted from is intended to provide the manner and conditions under which such persons may vote and a substantial compliance with the statutes is essential to authorize such persons to vote whose names are not on the official list.

The testimony in regard to such voters is to the following effect. A number of persons who had attained their majority since the regular assessing time had expired voted at the election. The statutes permit such persons to vote, but requires that an affidavit showing that eligibility to vote should be prepared and attached to their ballot. This was done, but a separate list of such voters and all others whose names were not on the official list was not prepared as the statute requires. However, the names of such voters were entered on the poll books or register of voters, and opposite each name was written the words "baby voter." The purpose of the statute was thus accomplished though not in the manner prescribed by the statute. It plainly appeared who these first voters were and nothing more would have been accomplished had a separate list thereof been made.

A number of persons voted on poll tax receipts issued the voters in other counties, and a strict compliance with the statute would have required that their names be also entered upon this separate list. This was not done, but the poll books show the names of all such persons who had voted. This was done by requiring them to exhibit their poll tax receipts and opposite their names there was written the number of their poll tax receipts and the name of the county where issued, so that the regular poll book did in fact contain the information which the special list was intended to supply.

This is a practice not to be approved as the statute should be literally complied with, and the names of all persons voting, which do not appear on the certified list,

should have been shown on a separate list. There is no intimation that any fraud was intended or that any resulted, as the separate list would have furnished no information not disclosed on the regular poll book.

We think the court therefore not in error in holding that the statute had been substantially complied with and that the votes of these electors should not be rejected on account of this irregularity.

The big and controlling question in the case is that of the eligibility of many students whose homes had not been in Fayetteville before enrolling as students at the University. A number of these admitted that they were in Fayetteville for the sole purpose of attending the University, and that they did not intend to become residents of the City. All of these votes were properly rejected. But there were others whose right to vote presented close questions of fact. The court heard the testimony relating to challenging votes, with great patience and passed upon the eligibility of each voter separately.

A large number of young students had served in the Army and upon their discharge had entered the University under the G.I. Bill of Rights. This fact did not render them residents within the meaning of our election laws and the court so properly held.

In passing upon the eligibility of these student voters the court applied the rule to test their eligibility announced in the case of Wilson v. Luck, 203 Ark. 377, 156 S.W. 2d, 795, which is to the effect that a person removing from his old home did not acquire a new domicile until he had abandoned his old one. In other words, for the purpose of voting a person does not have two domiciles with a right to choose between them. His domicile is either at one place or the other.

The court announced the rule to be applied in passing upon the eligibility of the student that "A student who comes to Fayetteville for the sole purpose of securing an education does so without making a change of residence. It is necessary to have a *bona fide* intention to make Fayetteville his home permanently or for an in-

definite period and not to limit it to the time necessary to get an education." This appears to conform with the weight of authority as shown in the annotation to the case of Anderson v. Pifer, 37 A. L. R. 134.

We have before us a record of enormous size, as many of the students were examined touching the permanency of their residence in Fayetteville, but we think the court correctly applied the rule above stated in all cases except as herein stated.

The city passed an ordinance providing for assessing and collecting a license fee for the privilege of operating motor vehicles upon the streets and alleys of the City of Fayetteville, "specifying the rates and terms; Defining certain words, and for other purposes." The ordinance provided that the words "resident of the City of Fayetteville, Arkansas, for the purpose of the ordinance, means any person whose place of abode is within the limits of the said City," with the proviso that the words above quoted should not be construed to include *bona fide* students of the University of Arkansas or the Fayetteville Business College. The City Clerk testified that at first free licenses were issued to all students at either of the above named institutions, but that later the exemptions in the ordinance were construed as applying only to non-resident students and after 1946 stickers were issued only to non-resident students who applied therefor as non-resident students. The City Clerk furnished a list containing 20 names of students who had been issued current automobile stickers as non-residents. No charge was made against these students who otherwise would have been required to pay the $5.00 license fee charged all others. In other words, these 20 students had by their apparent representation that they were non-resident students obtained exemption from paying the license fee required of all others, yet they had voted at the election as residents of the city.

The case of Williams v. Dent, 207 Ark. 440, 181 S. W. 2d, 29, turned upon the question of the residence of one Williams in the City of Little Rock, his right to serve as a member of the city's waterworks commission being de-

pendent upon that fact. It was there said: "Whether Williams had moved from the City was a matter for the Council to determine. The holding in Hillman v. Hillman, 200 Ark. 340, 138 S.W. 2d, 1051, was that in considering evidence relating to one's intentions to become a citizen of a particular place, and in weighing its sufficiency, it was necessary to look behind mere physical action and to appraise human behavior. In other words, evidence of intent is largely controlling, but circumstances may belie protestations of purpose; and the examing body is not required to believe claims of intent when circumstances point to a contrary conclusion."

The circumstances under which the students obtained this exemption from paying the license fee are not detailed. Ordinarily this action in obtaining this exemption which was granted only to non-resident students implies a representation as to their place of residence and unless explanation is made the court should declare them *prima facie* ineligible to vote as residents of the city.

We think the court was in error in the interpretation and application given to the stipulation regarding Exhibit "N" above copied. The parties differ very radically as to its purpose and effect. The court was justified in holding that it was anticipated that the witnesses not called to testify would testify as had those who had been examined, but the insistence is that this related only to the manner in which they had voted, and the record made thereof and that it was not intended to stipulate that they were otherwise qualified electors.

This Exhibit "N" above referred to embraced the names of voters challenged as above stated on the grounds, among others, that the proper return of the names as electors was not made. The defendant began an examination of persons whose names appeared on this Exhibit "N" as the burden was upon him to prove the persons were qualified as their names did not appear on the certified list of voters. Appellant undertook and offered to show after the stipulation above copied had been filed that the persons whose names appeared on

Exhibit "N" were not qualified to vote although they had voted in a manner conforming to law in respect to making a list of such names. In view of the misunderstanding of the purpose and effect of the stipulation we think the court should have permitted appellant to have axamined those persons appellee had not examined whose names appeared on Exhibit "N," including the name of R. L. Tipton whose name had inadvertantly been omitted from the list.

The judgment will, therefore, be reversed and the cause remanded, but upon the new trial it will not be necessary to try again the numerous questions relating to the eligibility of the voters, as we find no error except in two respects. First, the students who had obtained free licenses should be held ineligible in the absence of a showing that no fraud had been practiced by them in obtaining their exemption from the payment of the license fee and: Second, Appellant should be permitted to continue the examination of the persons whose names did appear on Exhibit "N."

The judgment will be reversed for the purpose only of passing upon the two last questions just stated.

BONNER *v.* SURMAN.

4-8864 220 S. W. 2d 431

Opinion delivered May 16, 1949.

O. C. Brewer and *A. M. Coates,* for appellant.

Dinning & Dinning, for appellee.

GRIFFIN SMITH, Chief Justice. Appellant, a widow who worked as a seamstress, has two sons, one of whom —Bobby, 18 years of age—occasionally drove her car, sometimes using it to deliver newspapers. Marion Surman, 14 years of age, was injured in April 1948 while assisting Bobby with his work. In a suit by Virginia Haley, Marion's mother, judgments for $2,000 were rendered against appellant,—$1,500 for Marion and $500 for his mother—on the theory that when the collision occurred, "Bobby Bonner was in and about the business of Rachael Bonner".[1]

Bobby usually covered his route on a bicycle during afterschool periods. However, on April 20 he borrowed his mother's car, first driving from home to the school campus where Marion and a young girl friend joined him. Marion had formerly assisted Bobby in serving the route.

There was sufficient evidence for the jury to find that Bobby's inattention as a driver caused the collision with a parked truck, resulting in Marion's injuries, hence a review of circumstances is not necessary.

The only question is, Was there substantial evidence that delivering papers was Rachael Bonner's business? It was admitted that Bobby occasionally used the money he earned in a way indirectly advantageous to appellant.

[1] The quoted matter appears in an instruction, made a condition precedent to the right of recovery.

The complaint alleged that Rachael Bonner ". . . was engaged in delivering . . . the Helena '*World*' to the various subscribers residing [in an interurban area called Crestwood] and [elsewhere], . . . and in connection with delivering said papers used an automobile which was regularly driven by her son, Bobbie Bonner. . . ."

Undisputed evidence is that Mrs. Bonner did not have a contract with the Helena *World,* and that her son's work, although permissive, was on his own account. The peg upon which it is urged liability should be fastened is Mrs. Bonner's frank statement that Bobby had at times used his earnings to purchase personal wearing apparel. Bobby did not contribute to the household upkeep, such as buying groceries and like necessities. Appellant testified positively that no contributions were made to her.

The rule has been repeatedly stated that a parent is not liable for the negligence of a son or daughter when operation of the parent's automobile caused damage in circumstances where the relationship of principal and agent, or master and servant, did not exist. *Featherstone* v. *Jackson,* 183 Ark. 373, 36 S. W. 2d 405.

Where a mother received all of her minor son's wages as employe of an oil company and furnished the automobile he used in going to and returning from work, it was held that the employment was for the mother's sole benefit and advantage, hence she was liable for damages caused by use of the car. *Irvine* v. *Killen,* 109 Pa. Super. 34, 165 Atl. 528. In another Pennsylvania case recovery against a minor's father was denied because agency was not established as a matter of law where evidence showed that the son was permitted by his father to drive a car wherever he desired. Other facts were that if a member of the family chose to enjoy the car, the son drove it for them. He had been trained at a business college, had been employed by various persons, had received—with his father's consent—wages thus earned, and from these wages had educated and practically clothed himself. On the day of accident, desiring

to go to a neighboring town in response to a letter offering employment, the minor requested his father to permit him to take the automobile, first informing the parent of the object of the trip. The Court said, in effect, that the paternal interest a father has in his son's welfare is not to be confused with a business interest, which would subject the father to damages. *Kunkle* v. *Thompson,* 67 Pa. (Superior Court) 37.

The general common law rule is that a parent is not liable for the minor child's torts unless there is some element of participation. *McCarthy* v. *Heiselman,* 140 App. Div. 240, 125 N. Y. S., 13. The New York case dealt with a situation where the defendants' infant entered the plaintiff's employment with defendants' consent, and turned over his wages to them. This, it was held, did not make such infant the agent or servant of defendants so as to charge them with liability for the infant's conversion of the employers' money.

In the absence of extraordinary circumstances the head of the parental household is entitled to a minor child's wages. Where, however, the parent in authority permits the child to contract for himself, emancipation in respect of earnings may be implied. *Biggs* v. *St. Louis, Iron Mountain & Southern Railway Co.,* 91 Ark. 122, 120 S. W. 970.

In the case at bar the collateral benefit received by appellant was what she may have saved in the purchase of clothing for Bobby, due to his voluntary act in applying some of his money in that way. But before this money was spent, the mother had relinquished any claim to it, and did not exercise any element of control. At most the benefit was uncertain, and dependent upon the minor's volition.

We are not able to say that a substantial question of fact was made for the jury. It follows that the trial Court should have instructed the jury to find for the defendant.

Reversed. Cause dismissed.

4-8880 220 S. W. 2d 409

Opinion delivered May 16, 1949.

W. J. Smith, for appellant.

Davis & Allen and *H. D. Dickens,* for appellee.

MINOR W. MILLWEE, Justice. The Workmen's Compensation Commission found that appellant, Glenn A. Green, sustained an accidental injury to his eyes which

arose out of and in the course of his employment by appellee, Lion Oil Company, in June, 1947. The commission denied appellant's claim for weekly compensation benefits because he received a salary from the State during the period of disability in excess of what his earnings would have been had he remained in appellee's employ, but ordered payment by appellee of necessary medical expenses incurred by appellant as a result of the injury. Appellee, a self-insurer under the Compensation Act, appealed to the circuit court which reversed and set aside the order of the commission on the ground that there was not sufficient competent evidence in the record to warrant the award for medical expenses. Appellant prosecutes this appeal from the circuit court judgment.

Appellant resigned his position as Publicity Director for the State of Arkansas and entered the employ of appellee as assistant advertising manager on June 15, 1947. At that time he had suffered occasionally for approximately two years from a slight conjunctivitis. A few days after he started working for appellee he received treatment from Dr. Raymond C. Cook of Little Rock and was fitted with glasses to correct the condition.

According to the testimony of appellant, his condition had materially improved on June 26, 1947, when he and a co-worker went to the fertilizer plant operated by appellee at El Dorado, Arkansas, to take some pictures to be used in company advertising. The fertilizer manufactured at the plant is known chemically as ammonium nitrate which is packed and distributed in pellet form in 100 pound sacks. In arranging a sack of the material for photographing, appellant worked with it with his bare hands for a period of two or three hours. It was a hot day and he perspired freely using his handkerchief repeatedly to dry his hands and face. He went directly from the plant to his hotel room where he first became conscious of irritation in his eyes.

His condition grew progressively worse and on July 1, 1947, he again consulted Dr. Cook who found appellant suffering from acute purulent conjunctivitis for

which treatment was administered. On July 2, 1947, corneal ulcers had developed and appellant underwent radical treatment for a two weeks period and was totally disabled for five weeks. He was discharged by Dr. Cook on August 5, 1947, with vision of 20-20 in both eyes and pupils back to normal.

Appellant resigned his position with appellee on June 30, 1947, and resumed his former position with the state on July 1, 1947. He received his regular salary from the state during the five weeks period of disability although he was unable to perform his duties during that time. The record does not indicate the exact date appellant filed his claim with the commission, but on July 16, 1947, appellee filed its report of intention to controvert the claim in which it is stated: "Reason for Controverting Claim. Deny that Glenn A. Green received the alleged injury while working for Lion Oil Company."

The effect of Dr. Cook's testimony is that appellant undoubtedly came in contact with something that resulted in a marked irritation of the eyes between the treatments of June 21 and July 1, 1947. It was his opinion that appellant's exposure to and contact with the ammonium nitrate aggravated the pre-existing subacute conjunctivitis and resulted in formation of the corneal ulcers and temporary total disability for five weeks.

The testimony of Dr. Cook was disputed by that of Dr. M. V. Russell who did not treat appellant, but testified as an expert on behalf of appellee. Dr. Russell stated that while ammonium nitrate would result in eye irritation, he did not believe that enough of the chemical could have been transmitted to appellant's eyes in the manner described to result in ulceration. He also stated that appellant's contact with a large amount of ammonium nitrate would have caused an ulcerated condition within 48 hours, if at all; and that since such condition did not set up until several days thereafter, it was his opinion that some systematic or other condition was the cause of the formation of the ulcers. On this point Dr. Cook stated that the period of the development

of the ulcers after exposure would depend on the amount of ammonium nitrate that got into the eyes of one already suffering from subacute conjunctivitis and that if the amount was small and in the form of a fine dust, it would set up an allergic infection which would take a few days for the ulcer to develop.

R. L. Payton, a chemical engineer and assistant supervisor of the nitrate plant, testified that he and other employees at the plant had gotten ammonium nitrate in their eyes on many occasions and that the normal reaction was an immediate stinging senstion which soon subsided. He also stated that if a large quantity of the chemical got in the eyes, it was necessary to wash the eyes to obtain relief, and that the company maintained places over the plant for that purpose. He would not attempt to say what the reaction would be on eyes already diseased.

Dr. M. D. Barnes, a research chemist employed by appellee, disagreed with Dr. Cook and other witnesses as to the chemical being an eye irritant. After a learned and extensive explanation of the chemical properties found in ammonium nitrate, he stated that similar properties were used in various eye medicines and that in his opinion appellant's trouble could not have been caused by the chemical. He concluded that a weak solution of the chemical would make a good eyewash and stated that he administered a one percent solution of ammonium nitrate to one of his eyes for three days prior to the giving of his testimony without harmful effect. His invitation for those present at the hearing to examine his eyes invoked the following testimony in response to questions by one of the commissioners: "Q. When did you do this, doctor? A. I did it this past week end, starting Friday night. Q. Is that the reason your eye is red now? A. (No response)." His work was confined to the laboratory and he did not know of the experiences of employees at the plant as related by Mr. Payton. He stated that these employees must have gotten more than a 1% solution of the chemical in their eyes.

The question for determination is whether there was sufficient competent evidence to support the commission's finding that appellant received an accidental injury to his eyes which arose out of and in the course of his employment. If the commission's finding that appellant sustained such an injury is supported by substantial evidence, the trial court erred in reversing and setting aside the award of the commission. It is not the province or duty of either the circuit court or this court on appeal to try *de novo* cases heard by the Workmen's Compensation Commission. Solid Steel Sissors Co. v. Kennedy, 205 Ark. 958, 171 S. W. 2d 929.

It is also well settled that the circuit court on appeal from the commission and this court on appeal from the circuit court must give to the findings of fact by the commission the same force and effect as the verdict of a jury or of the circuit court sitting as a jury. Lundell v. Walker, 204 Ark. 871, 165 S. W. 2d 600; Sturgis Brothers v. Mays, 208 Ark. 1017, 188 S. W. 2d 629. In determining whether there is sufficient evidence to support the award, both the circuit court and this court on appeal must weigh the testimony in the strongest light in favor of the commission's findings. Hughes v. Tapley, Admr'x, 206 Ark. 739, 177 S. W. 2d 429. We have also adopted the rule stated by the California Court in Pacific Employers Ins. Co. v. Industrial Accident Commission, 19 Cal. 2d 622, 122 P. 2d 570, 141 A. L. R. 799, as follows: "Circumstantial evidence is sufficient to support an award of the commission, and it may be based upon the reasonable inferences that arise from the reasonable probabilities flowing from the evidence; neither absolute certainty nor demonstration is required." Herron Lumber Co. v. Neal, 205 Ark. 1093, 172 S. W. 2d 252; J. L. Williams & Sons, Inc. v. Moore, 206 Ark. 766, 177 S. W. 2d 761.

This court is also committed to the rule that an aggravation of a pre-existing diseased condition resulting in death or disability is compensable, if caused by an accidental injury that arises out of and in the course of employment. McGregor & Pickett v. Arrington, 206 Ark.

921, 175 S. W. 2d 210; Harding Glass Co. v. Albertson, 208 Ark. 866, 180 S. W. 2d 961.

In support of the judgment of the circuit court, appellee contends that appellant's own testimony conclusively shows that he did not get ammonium nitrate in his eyes because he stated that he felt the irritation to his eyes for the first time when he arrived at his hotel room from the plant, while the evidence shows that he would have experienced an instantaneous burning sensation while working with the chemical. It is also insisted that the commission gave unwarranted weight to the testimony of Dr. Cook and that the latter's conclusion as to the cause of the acute conjunctivitis which resulted in corneal ulcers on appellant's eyes was wholly conjectural.

The evidence is in conflict, but it was the province of the commission as the fact finding body to harmonize the various inconsistencies in the testimony. Appellant gave a reasonably clear history of having gotten the ammonium nitrate in his eyes which were already diseased by subacute conjunctivitis. This experience was followed by increasing pain and culminated in a severe and disabling condition of his eyes. The testimony of Dr. Cook that in his opinion the chemical caused or could have caused the disabling condition was not an unreasonable conclusion to be drawn from all the facts and circumstances. It is our conclusion that the evidence, when considered in its strongest light in favor of the commission's findings, was substantial and sufficient to support the award.

Appellee also argues that under § 11 of Act 319 of 1939, which was in effect at the time of the alleged injury, it had the right to select the physician for the treatment of injured employees and is under no obligation to reimburse appellant for the medical expenses which he has incurred. Appellee also insists that there was no proof of medical expenses nor statement thereof rendered the commission as required by this section of the compensation act.

The commission made an open award in appellant's favor for necessary medical expenses without determining the amount or reasonableness thereof. This procedure was not objected to by appellee at the hearing. There was in fact testimony as to the amount of Dr. Cook's charges. There was also evidence that appellee knew of the treatment of appellant by Dr. Cook at the time it filed notice of intention to controvert the claim on the sole ground that appellant did not receive the alleged injury while working for appellee. The proceedings before the commission were confined to the question whether appellant sustained an accidental injury arising out of and in the course of his employment. The issues of appellee's right to select the physician, the amount and reasonableness of medical expenses and the rendition of a statement of such expenses were not raised before the commission and may not be raised for the first time on this appeal. Murch-Jarvis Co., Inc. v. Townsend, 209 Ark. 956, 193 S. W. 2d 310.

It follows that the trial court erred in setting aside the award of the Compensation Commission. The judgment is, therefore, reversed and the cause remanded with directions to reinstate and affirm the findings and order of the commission.

Justice Frank G. Smith, not participating.

Jeffery, County Judge *v.* Trevathan.

4-8870 220 S. W. 2d 412

Opinion delivered May 16, 1949.

Millard G. Hardin, M. F. Highsmith and *W. M. Thompson,* for appellant.

C. M. Erwin, for appellee.

Barber, Henry & Thurman, Amici Curiae.

Ed. F. McFaddin, Justice. The Publicity Act (Initiative Act No. 2 of 1914) is involved on this appeal, as also are questions of *res judicata* and Mandamus.

Appellee Trevathan (plaintiff below) owns and publishes a newspaper in Independence county, known as "Batesville News Review." Appellant Jeffery is the County Judge of Independence county, and the other

appellants are all of the other members of the Quorum Court.[1] They were the defendants in the Circuit Court. The plaintiff filed a complaint praying for a writ of mandamus to compel the defendants as the Quorum Court to make certain appropriations. The defendants stood on their demurrer, which was overruled. Thereupon the writ of mandamus was issued as prayed; and the appellants have appealed.

In 1947, the County Clerk of Independence county—acting under the provisions of §§ 4 and 5 of the Initiative Act No. 2 of 1914 (§§ 8792-93, Pope's Digest) caused to be published in the plaintiff's newspaper a summary of the proceedings of the County Board of Equalization and also a list of the claims allowed by the County Court. The total cost for the publication of these items in 1947 amounted to $316.80; and we will refer to this amount as "the 1947 claim." The plaintiff filed his claim with the County Court for the $316.80, and the claim was disallowed. The plaintiff appealed to the Circuit Court, which by its judgment of April 12, 1947, affirmed the disallowance made by the County Court, saying:

"This claim seems to be just and legal, but there was no appropriation whatever made by the Quorum Court of this County for the purpose of taking care of this claim or claims of this nature. And under the rulings of the (Supreme) Court in that particular case,[2] which seems to be identical with the facts here, this court will have to hold, as a matter of law, that the claim should not be allowed. There will be a judgment here for the defendant Independence County."

The plaintiff appeared before the Quorum Court at its regular meeting in November, 1948, and urged that an appropriation be made, not only for the 1947 claim, but also for the payment of claims in 1948 arising because the County Clerk continued in 1948 to have matters published, as required by §§ 8792-93, Pope's Digest. The Quorum Court refused to make any such appro-

[1] Art. VII, § 30 of the Arkansas Constitution.

[2] Referring to Nevada County v. News Printing Co., 139 Ark. 502, 206 S. W. 899.

priation for 1947 or 1948, although ample funds were available for such purposes, and unused for any other purpose.

In 1948, the Clerk of Independence County—continuing to act under § 5 of Initiated Act No. 2 of 1914—caused to be published in the plaintiff's newspaper a list of all the claims allowed by the County Court. The total cost for the publication of these amounted to $180; and we will refer to this amount as "the 1948 claim." Instead of filing the 1948 claim with the County Court, the plaintiff on December 2, 1948, filed the present action in the Circuit Court, alleging all the facts as heretofore recited, and further alleging:

". . . that on the 1st day of November, 1948, there was in the treasury of Independence County, Arkansas, to the credit of the county general fund the sum of nineteen thousand fifteen and 55/100 dollars ($19,015.55) and that there is now, a surplus in the treasury of Independence County, Arkansas, over and above all outstanding warrants and allowed claims an amount in excess of ten thousand dollars.

. . . . . .

"That at the time of the publication of all of said notices, . . . and at this time, there are ample funds in the treasury of Independence County, Arkansas, to pay all of said claims . . . and this plaintiff has no adequate remedy at law unless the Quorum Court of Independence County, Arkansas, the defendants herein, appropriate funds for the payment of said claim; . . .

. . . . . .

"That it was the duty of the defendants acting as members of the Quorum Court of Independence County, Arkansas, to appropriate sufficient monies from the treasury of Independence County, Arkansas, to pay the claim . . . for the year 1948 and that they had no discretion or right to deny or refuse to make such appropriation; . . . ."

The prayer of the complaint was for a writ of mandamus, requiring the Quorum Court to appropriate

money from the ample funds of the county to pay, not only the 1947 claim previously disallowed, but also the 1948 claim which the plaintiff held for presentation to the County Court as soon as an appropriation might be made.

As aforesaid, the defendants filed their demurrer, and after it was overruled they elected to stand on it and suffered final judgment to be rendered, from which comes this appeal. A demurrer admits, for the purpose of a ruling thereon, all the facts that are well pleaded. Keith v. Pratt, 5 Ark. 661; Gardner v. Hill, 197 Ark. 550, 123 S. W. 2d 1071; and see cases collected in West's Arkansas Digest, "Pleading, § 214.

We have summarized the salient facts stated in the complaint. Able briefs have been presented in this Court. We copy below the five points as listed by appellants on which they rely for reversal:

"First, because mandamus will not lie to control the actions of a ministerial body. That the body can be forced to act, but having once acted, its discretion cannot be controlled, if it has discretion.

"Second, because section 2527 of Pope's Digest provides the order in which the quorum courts shall make appropriations, and this Court has held that appropriations made under the first four paragraphs of this section are mandatory, but those made under paragraphs 5, 6 and 7 of said section are directory and contractual, and over which the quorum court has discretionary powers.

"Third, because claims against a county for publications under Initiated Act No. 2 of 1914 are contractual claims, they cannot be paid until an appropriation has been made by the quorum court, such appropriation must be made under authority of paragraph 7 of section 2527 of Pope's Digest, and since it is a contractual claim, the quorum court and the county court have discretion as to whether or not appropriations are made to pay such claims.

"Fourth, because Initiated Act No. 2 of 1914 is unconstitutional.

"Fifth, because $316, of appellee's claim, is *res judicata.*"

We proceed to dispose of the issues in the following topic headings.

I. *The 1947 Claim as Res Judicata.* This is the appellants' fifth point, as above listed. We will first consider it, before coming to the real and important issues. The plaintiff is entitled to no relief for the 1947 claim. The Circuit Court disallowed this claim on April 12, 1948, and that judgment has become final, because more than six months have passed, and no appeal has been lodged in this Court. See § 2746, Pope's Digest, and Webster v. Horton, 188 Ark. 610, 67 S. W. 2d 200; and cases collected in West's Arkansas Digest, "Judgment", § 564. So, in the eyes of the law, there is now no subsisting 1947 claim, and therefore the plaintiff has no standing in court to seek a mandamus to have an appropriation made to pay a claim that is barred.

It is true that the Circuit Court in its order of April 12, 1948, disallowing the 1947 claim expressed the thought that the judgment of disallowance would not be considered as *res judicata* if the Quorum Court subsequently made an appropriation. But the equitable intentions of the Circuit Court cannot alter the law that a solemn judgment of the Court disallowing the claim has become final. The main benefit the plaintiff gained by the 1947 claim was the indication as to what to expect if he presented his 1948 claim to the County Court before an appropriation had been made. Also, the plaintiff's experience regarding his 1947 claim clearly indicates his belief in the necessity of a mandamus proceeding to have an appropriation made before he presents his 1948 claim. So we consider the 1947 claim of $316.80 as passing out of this litigation, and we proceed to consider the mandamus case as applying to the 1948 claim which has never been disallowed.

II. *The Publicity Act of 1914.* In their fourth point appellants claim that this Act is unconstitutional. We

will first discuss the Act and the cases involving it, and then consider the appellants' argument.

At the general election in 1914 the People adopted Initiative Act No. 2 referred to heretofore and herein as the "Publicity Act." It consists of 14 sections and is found in its entirety on page 1511, *et seq.*, of the Printed Acts of 1915. The major portions thereof are to be found in §§ 8788-8801, inclusive, Pope's Digest, and in §§ 15-201 to 15-212, inclusive, of Ark. Stats. of 1947. By Act 239 of 1933 § 12 of the Publicity Act was amended in particulars not here important, except to show that the 1933 Legislature recognized the efficacy of the Publicity Act.

This Act has been before this Court in the following three cases, to wit: Nevada County v. News Printing Co., 139 Ark. 502, 206 S. W. 899; Smackover Journal v. News-Times Publishing Co., 185 Ark. 523, 48 S. W. 2d 219; and Pressley v. Deal, 192 Ark. 217, 90 S. W. 2d 757. We discuss the first two of these cases:

1. Nevada County v. News Publishing Co. was decided in 1918. In that case the County Clerk caused publication to be made as required by the Publicity Act; the newspaper publisher filed in the County Court a claim for the cost of publication; the County Court disallowed the claim; the Circuit Court reversed the County Court; and the case was appealed to this Court. In the opinion here, we pointed out that, under Art. XVI, § 12 of the Constitution, no money could be paid out of the treasury until there had been an appropriation; and that under § 1499, Kirby's Digest, (now § 2527, Pope's Digest[3] and § 17-409 Ark. Stats. of 1947) an appropriation for publication would come under subdivision 7 thereof—i. e., "to defray such other expenses of county government as are allowed by the laws of this State." We held the contract by the County Clerk with the newspaper to be a valid contract requiring no previous authorization of the County Court; but we held that the claim could not be paid by the County Court until an appropriation had

[3] Polk County v. Mena Star Co., 175 Ark. 76, 298 S. W. 1002 is one of the many cases discussing this section of the statutes.

been made by the Quorum Court. This language is apropos:

"The Legislature[4] made it mandatory upon the county clerk to publish in a newspaper a list of all claims allowed against the county, etc. This necessarily gave the county clerk the power to make a contract for such publication. The amount so expended by him became an expense of the county government, and an appropriation made under paragraph seven of section 1499[5] was available to pay such claim. The record in the present case does not show that any appropriation was made by the quorum court under paragraph seven of section 1499; but, on the contrary, the agreed statement of facts shows that no such appropriation was made."

2. Smackover Journal v. News-Times Publishing Co., *supra,* was decided in 1932. In that case the Secretary of State had caused the synopsis of the Legislative Acts (publication of which was required by § 2 of the Publicity Act) to be published in an unauthorized newspaper. The suit was to prevent such newspaper from receiving payment for the publication. This Court held that a newspaper which failed to have the qualifications prescribed by § 12 of the Publicity Act could not receive payment from the State for the publication. Mr. Justice Kirby, speaking for this Court, said:

"The People had the right to prescribe in said act for the publication of the synopsis and to determine what medium should be used for bringing it to the people's attention; and, having done so, the officer authorized to cause the publication to be made could exercise no discretion about the selection of a newspaper other than as prescribed by the statute for publication.

"Neither is the act violative of the Constitution of the State nor of the United States; and the publication, having been made contrary to the statute authorizing it, created no valid obligation against the State for

[4] The reference to the "Legislature" means the People acting as the Legislature.

[5] Reference is to § 1499, Kirby's Digest.

its payment, and no error was committed in granting the injunction prayed for."

So much for the germane portions of the Publicity Act and our cases construing it. We come now to appellants' claim that the Act is unconstitutional. Appellants contend that, under Art. VII, § 28 of the Constitution, the County Court "has exclusive original jurisdiction in all matters relating to county taxes . . . the disbursement of money for county purposes, and in every other case that may be necessary to the internal improvement and local concerns of the respective counties." Appellants argue that the publication of the claims allowed by the Independence County Court is a matter of local concern, and that the State cannot require Independence County to pay for such publication, if the Quorum Court does not so desire. As will be discussed in Topic III, *infra,* the net effect of this contention would be that a State law, requiring counties to publish claims at the expense of the counties, could be of no validity in any county which did not wish to comply with the State law. Appellants cite the following cases: Lyons Machinery Co. v. Pike County, 192 Ark. 531, 93 S. W. 2d 130; Watson v. Union County, 193 Ark. 559, 101 S. W. 2d 791; Rebsamen v. Van Buren County, 177 Ark. 268, 6 S. W. 2d 288; Allen v. Barnett, 186 Ark. 494, 54 S. W. 2d 399. We agree that an Initiated Act, as regards constitutionality, is to be determined just as though it were an Act of the Legislature, because in adopting an Initiated Act the People become the Legislature, and must legislate within constitutional limits. So the cases involving the constitutionality of legislative acts are applicable here. We list four cases as typical of the many which are authority for holding that the Publicity Act is constitutional as regards the attack here made on it.

(a) In Cain v. Woodruff Co., 89 Ark. 456, 117 S. W. 768 it was claimed that a legislative enactment, requiring the county to pay the sheriff seventy-five cents per day for feeding each prisoner, was void as violative of the county court's power under said Art. VII, § 28 of the Constitution. In holding the Act valid, we said:

"The Legislature, unless restricted by the Constitution, has full and plenary powers to adopt such policies and prescribe the duties which it demands of officers in carrying out such policies which it deems best for the peace and welfare of the People. Straub v. Gordon, 27 Ark. 625; Carson v. St. Francis Levee District, 59 Ark. 513, 27 S. W. 590.

"Aside from the restriction of the State or Federal Constitutions, the Legislature is unfettered in the exercise of legislative power. The question as to whether the enactment is wise or expedient belongs exclusively for the General Assembly to determine. State v. Martin, 60 Ark. 353.

" 'The Constitution regards the county courts as political and corporate bodies that are to be controlled and regulated in their discretion by the acts of the General Assembly, and not as independent of or superior to it. As political and corporate bodies, they are required to conform their action to the rule of the Legislature, and in the exercise of their jurisdiction to proceed in the mode and manner prescribed by law. County of Pulaski v. Irvin, 4 Ark. 475; Hudson v. Jefferson County Court, 28 Ark. 359.' "

(b) In Crawford County v. City of Van Buren, 201 Ark. 798, 146 S. W. 2d 914 it was claimed that a legislative enactment requiring the quorum courts to appropriate money for municipal court purposes was violative of the said Art. VII, § 28 of the Constitution. In holding the legislative enactment to be valid, we said, in referring to §§ 28 and 30 of Art. VII:

"We do not think, however, that these sections of the Constitution operate to deprive the general assembly of the power to impose duties upon counties and to require counties to pay therefor. Our cases are to the contrary. For instance, in the case of Polk County v. Mena Star Co., 175 Ark. 76, 298 S. W. 1002, there is an enumeration of various items of expenses imposed upon counties by legislative enactment. In the case of Burrow, County Judge v. Batchelor, 193 Ark. 229, 98 S. W.

2d 946, there was involved an act of the general assembly requiring all counties to pay salaries of circuit court and grand jury stenographers. This act was upheld, it being there said that these salaries must be paid as long as there is money in the county general fund to pay them, and that it was not discretionary with the county court to allow them, and that if it failed to do so, the circuit court might compel the county court to perform this ministerial duty."

(c) Again, in Jackson County v. Nuckolls, 102 Ark. 166, 143 S. W. 1065, there was involved a legislative enactment requiring the county to pay the costs in misdemeanor cases. In upholding that legislation, we said:

"It was within the power of the Legislature to make counties liable for costs in misdemeanor cases tried before a justice of the peace where the parties charged are convicted, and to provide for the payment of such costs out of the funds appropriated for the payment of circuit court expenses."

(d) In Adams v. Whittaker, 210 Ark. 298, 195 S. W. 2d 634 it was claimed that Act No. 107 of 1945 was unconstitutional because it required the counties to pay the cost of holding the elections required by that Act. We held that the Act was constitutional, and that the counties were liable for the expenses of the election.

It would unduly extend this opinion to cite the many other cases upholding the power of the Legislature to require various items to be paid by the County Court, and to discuss and distinguish the cases cited by the appellant. It is sufficient to say that we do not impair the holding in any of the cases cited by appellants; we merely hold that such cases are inapplicable to the situation here presented. It was not urged in this case that it was beyond the power of the Legislature of 1909 to pass the Act which is now § 2527, Pope's Digest, classifying claims which the county court must allow. That being true, it necessarily follows that it was within the power of the Legislature (that is, the People in this case, in adopting the Publicity Act of 1914) to provide,

in § 9 thereof that "all acts for publication required by §§ 4, 5 and 7 shall be paid by the county in which said publications are made when the same are approved by the County Court, and the respective 'levying courts' are hereby authorized to make appropriations for that purpose." Putting the spotlight of publicity on the list of claims allowed by the County Court in each county through the State was a matter that the People thought desirable. Whether the law was wise is not for the courts to decide. Our holding goes to the fact that the Publicity Act is constitutional in requiring the costs of publication to be paid by the county, just as the Acts imposing other costs to be paid by the respective counties were held constitutional in the cases heretofore discussed.

Although it is not cited in the briefs, nevertheless, we hold that Art. XIX, § 12 of the Constitution directly authorizes the passage of the Publicity Act. That constitutional provision reads: "An accurate and detailed statement of the receipts and expenditures of the public money, the several amounts paid, to whom and on what account, shall, from time to time, be published as may be prescribed by law."

III. *Mandamus.* In their first, second and third points appellants make their several contentions against the granting of the writ of mandamus in this case. These contentions, summarized, are: that the quorum court is a body possessing discretion, and that claims in the seventh subdivision of § 2527, Pope's Digest, are contractual, and that mandamus does not lie to control the discretion of the quorum court on contractual matters. Appellants cite these cases to sustain their contentions: Rolfe v. Drainage District, 101 Ark. 29, 140 S.W. 988; Hodges v. Dawdy, 104 Ark. 583, 149 S.W. 656; Collins v. Hawkins, 77 Ark. 101, 91 S.W. 26; Miller v. Tatum, 170 Ark. 152, 279 S.W. 1002; Worthen v. Roots, 34 Ark. 356; Polk County v. Mena Star Co., 175 Ark. 76, 298 S.W. 1002; Nevada County v. News Printing Co., 139 Ark. 502, 206 S.W. 899.

Without attempting to distinguish these cases, (which this opinion in no respect impairs), we conclude that they do not apply to a situation such as the one existing in the case at bar. Here, the Publicity Act (which we have held to be constitutional) prescribes in §§ 4 and 5 thereof that the clerk of the county court "shall cause to be published, one time in one newspaper published in such county" the certain matters stated in the said sections; and § 13 of the Publicity Act provides "every person who shall fail to comply with the provision of this Act shall be fined in any amount not exceeding $1,000." We held in Nevada Co. v. News Publishing Co., *supra,* that the county clerk could make a valid contract of publication without an order of the county court, because the Act imposed such duty on the clerk; and we held in Smackover Journal v. News Times Publishing Co., *supra,* that the officer charged with having the matters published could exercise no discretion contrary to the statute.

In the case at bar it is admitted by the demurrer that Independence County, at all times herein involved, had ample funds to comply with the Publicity Act, but that the Quorum Court refused to make any appropriation. The result is that the law of the State (the Publicity Act) fails of observance in Independence County. Can a Quorum Court—composed of the County Judge and the Justices of the Peace, according to Art. VII, § 30 of the Constitution—thus defy the Act of the People and render the State law nugatory in a County? The learned circuit court, in awarding the writ of mandamus in this case, used this language in the written opinion:

"If the Quorum Court is not required under the law to make the appropriation then it can simply refuse to do so and totally nullify the provisions of the law and indirectly repeal it. If the Act does what it contemplates an appropriation must be made by the Quorum Court. It is not for the court to say whether the act is a good one or a bad one, but it is the law and should be enforced until repealed by the People who enacted it, or the Legislature. Under the law, as I view it, it is the

duty of the Quorum Court to do its duty and part in seeing to it that the provisions of the law are enforced under penalty provided by the act; that the statute means the Quorum Court should make the necessary appropriation. To hold otherwise would permit said court to nullify the law so far as it applies to a county.

"The clerk has performed his duty and it is the opinion of the Court that the Quorum Court should do its part in making the appropriation. Then the claims of the petitioner can be submitted to the County Judge for his approval before same can be paid."

We agree with the above quotation. The "discretion" which the Quorum Court had was to withhold appropriation of money to pay the costs of publication until the preferred claims of the County (that is, those in subdivisions 1 to 6, inclusive, of § 2527, Pope's Digest) had been provided for. The complaint in this case alleges, and the demurrer admits, that after all these claims in subdivisions 1 to 6, inclusive, had been paid, there still remained ample funds to pay the publication items arising under the Publicity Act, and that these funds have never been used for any purpose. We hold that the Quorum Court, with ample funds on hand, has no discretion to refuse to comply with a valid law—i. e., the Publicity Act.

We have many cases in which mandamus has been awarded in analagous situations. In Moyer v. Altheimer, 168 Ark. 271, 270 S.W. 91 we held that an order of mandamus could be issued against the County Court to compel that Court to apportion road money under the Act there involved, because under the legislation the County Court had no discretion as to the allowance of the claim. In Manhattan Rubber Mfg. Division v. Bird, Mayor, 208 Ark. 167, 185 S.W. 2d 268, 159 A. L. R. 1257, we held that mandamus would lie against the city to require it to pay a claim. It was there shown that the city had the money with which to pay the claim if it desired, and that the claim was contractual; but we directed that the writ of mandamus be awarded requiring the city to pay the claim prior to other contractual obligations subsequently in-

curred. In the case at bar the claim is contractual, but the Publicity Act required the clerk (under the penalty of heavy fine for failure to do so) to contract with a newspaper for the publication of the claim. On showing here made, that the County has ample funds to pay the claim, the case of Manhattan Rubber Mfg. Division v. Bird, Mayor, *supra,* is clearly ruling.

In No. Ark. Hy. Impvt. Dist. v. Rowland, 160 Ark. 1168, 282 S.W. 990, we held that a writ of mandamus could issue against a county clerk to extend taxes levied by an improvement district; in Chicago Mill & Lbr. Co. v. Drainage Dist., 172 Ark. 1059, 291 S.W. 810, we said that the County Court could be compelled by mandamus to levy the tax; and in Stranahan v. Van Buren County, 175 Ark. 678, 300 S. W. 382, we held that the Quorum Court could be compelled by mandamus to meet as a court and levy a tax for the payment of outstanding bonds of the county. These cases clearly point to the conclusion that mandamus may be used to compel the quorum court and other county officials to comply with the legislative enactments; and such is the situation in the case at bar.

It follows therefore that we reverse, annul and set aside so much of the Circuit Court judgment as directed the writ of mandamus to issue for the 1947 claim of appellee, and we affirm so much of the said Circuit Court judgment as directed the writ of mandamus to issue for the 1948 claim of appellee.

LEO *v.* LEO.

4-8889 220 S. W. 2d 419

Opinion delivered May 16, 1949.

Franklin Wilder, for appellant.

Floyd E. Barham, for appellee.

GRIFFIN SMITH, Chief Justice. Joseph Leo, Jr., left Gloucester, Mass., in 1948, arriving in Fort Smith July 4th. His suit for divorce was filed 62 days later, alleging cruelty, and separation for three years. The complaint was dismissed December 21 because the plaintiff was not a *bona fide* resident of Arkansas, either when the suit was brought or when the decree was rendered. An order was entered directing Joseph to pay his wife, Annie Belle, $50 per month, less conditional credits. The appeal questions correctness of each order.

The Chancellor believed that reasonable inferences arising from the evidence disclosed an intent by the plaintiff to utilize the State's quick-divorce machinery and then return East. It is urged, however, that there was no testimony affirmatively disclosing such a purpose. In this respect the appellant is correct. However, intent, purpose, or design may be reflected by conduct more convincing than the spoken word. Before determining that the plaintiff was not a resident of Arkansas, the Chancellor considered oral testimony, and a number of depositions. On the question of cruel treatment the pattern characteristic of such cases was followed—one side affirming, the other denying, and making counter accusations. Here is an example:

Witness for Joseph: "Mrs. Leo was cruel. She called him 'fool', 'crazy', a 'jerk', a 'dope', and 'one

damned fool'. She swore at and cursed him, constantly belittled him, and as a result he suffered a nervous breakdown in 1943, for which he is still under medical treatment''.

Witness for Annie Belle: ''They used to visit me about once a week, both before and after they were married, and appeared to be sweethearts, and fondly attached to each other until Joseph ran away, leaving her 'flat' in 1945''.

Other testimony was equally contradictory.

A plaintiff's veracity may be judged by depositions procured and used on his behalf, as well as by testimony given in open Court. In determining what credit should be given Joseph's claim that he came to Arkansas on a doctor's order,[1] and intended to make Ft. Smith his home, the Chancellor weighed all of the testimony and reached an appraisement balance against the plaintiff. Joseph, being before the Court, and the Chancellor having found from what he said, the way he said it, and from the record as a whole, that Joseph did not intend to become a resident, the burden then passed to appellant to show, on appeal, that a preponderance of the evidence established a result contrary to the decree; and this he has not done. *Cassen* v. *Cassen,* 211 Ark. 582, 201 S. W. 2d 585.

Appellant's final contention is that if the trial Court lacked jurisdiction to grant the divorce, it was without power to award maintenance. The contrary rule has been followed. *Mohr* v. *Mohr,* 206 Ark. 1094, 178 S. W. 2d 502.

Affirmed.

Mr. Justice Holt did not participate in the consideration or determination of this case.

[1] A Massachusetts physician testified by deposition that Joseph Leo suffered from catarrh and earache, and that a warmer climate would be beneficial; hence, Arkansas was suggested.

HESKETT *v.* MCREE, TREASURER.

4-8859 220 S. W. 2d 422

Opinion delivered May 16, 1949.

Dinning & Dinning, for appellant.

C. L. Polk, Jr., for appellee.

GEORGE ROSE SMITH, J. Appellant brought this action for a writ of mandamus to compel the county treasurer to pay school warrants in the amount of $180. The appeal is from the trial court's refusal to grant the relief sought.

These warrants were issued by School District No. 27 in October and November, 1944, ostensibly in payment for services performed by Sarah Burton as a school teacher and by her brother as a janitor. They were presented to the county superintendent for countersignature as required by Ark. Stats. (1947), § 80-1004, but for reasons not disclosed by the record that official refused to sign them. No further action appears to have been taken by the payees until April, 1948, when the appellant, to whom the warrants had been assigned for convenience, filed a suit to compel the superintendent to sign the warrants and the county treasurer to pay them. The court ordered the superintendent to affix his signature but dismissed the action as to the treasurer, without prejudice.

In obedience to the court's order the superintendent countersigned the instruments. The present suit was

then brought. At the trial it was shown that District No. 27 had gone out of existence in 1947, having become a part of Consolidated District No. 2. The appellee defended the suit on the ground that she had no funds to the credit of District No. 27 and that she was prohibited by Ark. Stats. (1947), § 80-1003, from paying out of current revenues school indebtedness incurred in an earlier year.

We find it unnecessary to decide these questions, as we have concluded that the appellee is not the proper defendant. Although it is provided by Ark. Stats. (1947), § 80-423, that a consolidated district is liable for the debts of its constituent districts, the statute also states that it may be sued therefor. We do not construe the Act to mean that the new district must pay every outstanding warrant issued by its predecessors, regardless of validity. It may be that the warrants now presented are invalid for any of several possible reasons, such as forgery of the directors' signatures, want of consideration, etc. The real party in interest is the consolidated district, whose funds will be used to pay the claims. It has not been made a party to either suit and has had no opportunity to present its defenses. It is not unreasonable to assume that its directors have a reason for failing to set aside funds for the payment of these warrants. If there is a valid defense it would be circumvented if the appellant were permitted to proceed directly against the county superintendent and treasurer, without making the district a party. We accordingly affirm the action of the trial court, without prejudice to appellant's right to pursue the consolidated district.

PARKER *v.* CARSON.

4-8886 220 S. W. 2d 601

Opinion delivered May 23, 1949.

Philip A. DeSalvo and *Troy W. Lewis,* for appellant.

Bailey & Warren and *R. Eugene Bailey,* for appellee.

HOLT, J. W. S. Parker, appellant, sued appellees for $3,141.59, alleged due on a sale of certain merchandise to them. Appellees answered denying that they owed appellant the amount claimed, but admitted that they had agreed to pay $2,000 for the goods in question and that the property had been delivered to them, which they later traded for an equity in Little Rock property. They further alleged that they were entitled to a set-off against the purchase price in the amount of $1,700 for services rendered appellant and offered to confess judgment for $300.

The trial court found for appellant in the amount of $2,000 for the merchandise sold to appellees, less a set-off of $600 for services rendered by appellees to appellant, and entered a decree for appellant for $1,400 with interest thereon at 6% from the date of the decree, October 7, 1948, and declared an equitable lien on the property of appellees in Little Rock.

This appeal followed.

For reversal, Parker says: "Appellant contends that the allowance of only $2,000 gross for his merchandise, and not $3,141.59 as sued for; and the allowance of 6% interest from October 7, 1948, only, and not from the taking of his goods, January 7, 1947, as he prayed, was against the preponderance of the evidence on which this Court can predicate a reversal."

The parties are related by marriage. Appellant, Parker, in 1945, was engaged in merchandising in Fort Smith and decided to close out his business on account

of illness. He moved his stock of goods to Little Rock and stored it in a garage belonging to his brother, Earl Parker. While appellant was ill in Fort Smith, and after he moved to Little Rock, he concedes that appellees, at his request, rendered personal services of the value of $600, which he owed to them, as the trial court found.

George Carson testified that after the goods were brought to Little Rock and stored, appellant, after failing in his own efforts to sell them, sold them to him (Carson) for $2,000 and delivered the goods to him "to pay him (appellant) when I could and as I could."

Earl Parker's testimony on behalf of appellees tended to corroborate George Carson. He testified that George told appellant: "I can't pay you cash, but I will pay you along as I can and he (appellant) said, 'That will be all right,' and he (Carson) said, 'Wyatt, I am not going to pay you any interest, because I am not able to,' and Wyatt said, 'That will be all right.' "

Appellant testified, in effect, (quoting from appellant's brief): "That Carson claimed he had paid out $1,041.50 expenses in trying to sell the goods, and wanted to buy them. I did not know he was going to trade them to Jernigan. I told him I would take $2,000 cash for the merchandise. We agreed he was to pay me $2,000 before moving the merchandise. They were moved at night without my knowledge. I did not know until after they had been moved. I was not paid before they moved the goods. Carson took me late that night to some place where he tried to get the money. His wife went along in Carson's automobile. He said he could not rake up the money."

After a review of the testimony, we are unable to say that the findings of the Chancellor were against the preponderance thereof, and under our long established rule, we must therefore affirm the decree.

Since appellee was not to pay any interest, and was to pay for the goods along "when I could and as I could," the court correctly allowed interest at 6% from the date of the decree, Ark. Stat., (1947), § 29-124.

Affirmed.

PICKENS *v.* MCMATH, GOVERNOR.

4-8945 220 S. W. 2d 602

Opinion delivered May 23, 1949.

John E. Coates, Jr., for appellant.

Wood, King & Dawson and *Rose, Dobyns, Meek & House*, for appellee.

Marcus Evrard, amicus curiae.

FRANK G. SMITH, J. This case was disposed of on a demurrer to the complaint which was sustained and from which decree is this appeal. We therefore copy in full appellant's summary of its allegations.

Appellant, a citizen and taxpayer of the State, who is the owner of outstanding refunding bonds issued under Act No. 4 of 1941, hereinafter referred to as Act No. 4, brought this suit against appellees members of the State Board of Fiscal Control, for himself and all others similarly situated, to enjoin the sale and issuance of $7,000,000 of State Highway construction bonds authorized by Act No. 5 of the 1949 General Assembly, hereinafter referred to as Act No. 5.

Act No. 5, approved January 20, 1949, authorizes the State Board of Fiscal Control to issue not exceeding $28,000,000 of general obligation bonds of the State for construction and reconstruction of highways and bridges in the fiscal years 1949 to 1952 inclusive, provided that the issuance of the $28,000,000 in bonds was approved by the electors at a special election called by the Governor, for which the Act provided. The Act provides that the election shall be conducted by the county board of election commissioners as constituted immediately prior to the last general election. An emergency clause was attached. No referendum petition has been filed.

Both Act 4 and Act 5 authorize the issuance of bonds for road purposes, and Act 5 was patterned after Act

4 and it is quite apparent that in drawing the latter act the former was carefully considered.

Several questions were raised, which will be considered, but the important and controlling question is whether Act 5 impairs the obligations of the contracts made under the authority of Act 4.

Section 12 of Act 4 made allocations of highway revenues coming into the State Highway Fund each year which were designated in the opinion in the case of Clayton, State Treasurer, v. City of Little Rock, 211 Ark. 893, 204 S. W. 2d, 145, as allocations A, B, C, and D. Section 12 of Act 5 employs the same designation of allotments A, B, and C.

By allotment A in both Acts the first $10,250,000 of highway revenue as it comes into the State Highway Fund is set aside for highway maintenance and debt service for bonds issued under Act 4, in the proportion of 30% for highway maintenance, and 70% exclusively for current debt service and the redemption and purchase of such bonds.

Allotment B is identical in both Acts and both allotments are contractual in their nature. The revenues referred to in both allotments A and B come from the sale of motor fuel used in transportation on the highways of the State, and from license fees and auto division fees which must of course be maintained in order that the highway may be so used, the use of which involves the sale of motor fuel on which the tax is imposed and collected.

It was said in the case of Scougale v. Page 194 Ark. 280, 106 S. W. 2d, 1023 that: "Whatever enactment abrogates or lessens the means of the enforcement of a contract impairs its obligation," and it remains to be considered whether Act No. 5 has lessened the security given by Act No. 4 to the purchasers of bonds issued under the provisions of that Act.

We copy from appellant's brief his statement of the contentions why Act No. 5 has impaired the obligations

incurred under Act No. 4, and no other reason in support of that contention is suggested. They are:

"1. Notwithstanding the fact that Act No. 5 of 1949 respects and preserves contractual rights in allocations A, B and C, the change in allocation D impairs the contractual rights of the holders of outstanding bonds issued under Act No. 4 of 1941 and of counties and municipalities of the State, contrary to the contract clauses of the Federal and State Constitutions, which renders the Act void;

"2. The covenant in Act 5 not to permit the present laws to be amended so as to reduce the annual revenue pledged to meet the debt service of the bonds is invalid, as it contracts away the police power of the State and thereby renders the entire Act void;

"3. If the covenant not to permit the present laws to be amended so as to reduce the annual revenue pledged to meet the debt service is valid, the provision in subsection G of § 10 of Act No. 5 allocating the next $2,500,000 for a refund of a portion of the taxes paid on gasoline used in farm equipment, as the Legislature may determine, is in effect a reduction of the annual revenue pledged for debt service and violates the covenant and is void.

"4. The resolution of the State Board of Fiscal Control providing for notice of the sale of the bonds is based upon a certification by the State Highway Commission of the funds available for the fiscal year ending March 31, 1949; whereas, Act No. 5 of 1949 contemplates that said certification should be based upon the revenues of the fiscal year in which the bonds are issued which would be the fiscal year beginning April 1, 1949, and, therefore, the issuance of the bonds at this time would be premature;

"5. The emergency clause of Act No. 5 does not state facts sufficient to constitute an emergency under Amendment No. 7 of the Constitution of Arkansas and for that reason the Act, if valid, could not go into effect until ninety days after the adjournment of the Legis-

lature, and since the Act was not effective on February 15, 1949, the election held on that date was premature and void;

"6. Act No. 5 of 1949 creates vested rights. Amendment No. 7 to the Constitution of Arkansas forbids an emergency on any act creating a vested right. Therefore, the Act is invalid as an emergency measure. For that reason the Act, if valid, could not become effective until ninety days after the adjournment of the Legislature and the election, therefore, was void;

"7. The election on the bonds was not conducted by the county election boards provided for in Initiated Act No. 3 of 1948, and in some counties notice of the election was not given by proclamation of the sheriff, as required by the general election laws, and for this reason the election was void; and

"8. As the bonds would pledge the faith and credit of the State and its revenues, and were not approved by the people at a valid election, they would contravene amendment No. 20 of the Constitution of Arkansas."

In answer to these contentions it may be said that allocations A and B are in fact contractual in their nature, and it would impair the obligations of the bond contract to change them, but they have not been changed. They are the same in both Acts and each contains the contractual provisions for the payment of the bonds, so that the holders thereof have not been deprived of any security given them under Act No. 4 by Act No. 5.

Allotments C and D of Act No. 4 are not contractual in their nature as they relate to distribution of highway funds after allotments A and B have been fully made. The allotments C and D of Act No. 4 are allotments which are in the nature of gratuities and the State is under no contractual obligation to continue them. They may be given or withheld at the State's pleasure. It was so held in the Clayton case supra, and they cannot be given until allotments A and B have been observed.

In § 10 of Act No. 5, allocations A, B, D, E, H, and I will become contractual sections when bonds are issued under said Act No. 5, and allocations C, F, and G of § 10 of Act No. 5 are gratuity sections, as that term is used in Clayton v. Little Rock, supra.

As the security offered to the bond holders when the bonds were sold and issued under Act No. 4 has not been impaired or lessened, the objections contained in paragraphs 1, 2 and 3 of appellant's complaint are not well taken and cannot be sustained.

Appellant contends that under § 3 of Act 5 the certificate of the Highway Commission as to money available for construction of roads should be for the fiscal year beginning April 1, 1949, and not for the fiscal year ending March 31, 1949, and that therefore the issuance of the bonds at this time would be premature.

Section 1 Act No. 5 defines the word "year" or "fiscal year" as meaning the 12 month period beginning each April 1st and ending the following March 31st, and pursuant to the directions of § 3 the Fiscal Board prepared a certificate which recites that the Highway Commission had on April 8, 1949, certified the amount of revenue available to the State Highway Department for the construction and reconstruction of highways and bridges to be less than $13,000,000, so that the condition precedent for issuing $7,000,000 in bonds existed. In view of the facts stated we think it was the intent of Act No. 5 that the first issuance of bonds would be in the fiscal year beginning April 1, 1949, and this conclusion is supported by the recitals in the emergency clause of the Act as to the condition of the roads of the State and the urgency for their repair.

At the special election called and held pursuant to Act No. 5, the proposed bond issue was approved by a vote of 108,290 for, to 24,457 against, but it was alleged that in some counties notice was not given by the sheriff as provided in the general election law. As to this allegation it may be said that it is common knowledge that elections were held in all the counties in the State, and

that a substantial vote was polled in each of them, considering the fact that the election was a special one involving only a single question. In the case of Brown v. Bradberry, 214 Ark. 937, 218 S. W. 2d 733, where a similar question was raised it was said: "A second answer is that procedural directions when viewed retrospectively are not mandatory unless of the essence of what is to be accomplished. Though enforceable by appropriate action taken before the voters have spoken the participating majority will not (in the absence of fraud) be deprived of the fruits of its victory upon a showing that a ministerial act was overlooked. One of the frequently-quoted cases in which after-election complaints are discussed is Wheat v. Smith, 50 Ark. 266, 7 S. W. 161. See, also, Henderson v. Gladish, 198 Ark. 217, 128 S.W. 2d, 257. Many other decisions hold that the will of a majority cannot be defeated because of procedural omissions that did not prevent a fair expression."

It is insisted that the emergency clause of Act 5 does not state facts sufficient to constitute an emergency under Amendment No. 7 to the Constitution and for that reason the Act if valid, did not go into effect until ninety days after the adjournment of the Legislature and for this reason the election on February 15, 1949, was premature and void.

We think, however, that the emergency clause sufficiently declares the existence of an emergency within the meaning of Amendment to the Constitution No. 7. Its recitals are as follows:

"Section 20. It has been found and it is hereby determined by the General Assembly that many of the highways of the State are in a dangerous condition caused by lack of funds for their repair and maintenance and are a daily menace to the traveling public; that the repairs and construction of the present public roads and the construction of new roads contemplated by this Act are necessary for the safety of the traveling public, and that such repairs, reconstruction, and new construction should be commenced as early as practicable in the spring of the year 1949; that low interest rates now prevail which

have created a market advantageous to the issuance of bonds; that the duration of such low interest rates is uncertain for the following reasons: (a) the consensus among bond dealers and other experts is that the long term trend of interest rates is upward; (b) that the recent decline in the interest rates upon State and municipal securities is opposed to the forecasted long term trend of interest rates and may prove to be of short duration; (c) the supply of State and municipal securities is constantly being augmented by the issuance of large amounts of bonds by the States and municipalities, and (d) the possibility of war; that the State should take advantage of the present favorable market and its failure to do so will result in great financial detriment of the State; that only by this Act can the said dangerous condition of the State highways be promptly remedied and for that reason it should take effect without delay; and for said reasons it is hereby declared necessary for the preservation of the public peace, health and safety that this Act should become effective without delay. An emergency, therefore, is declared to exist and this Act shall take effect and be in force from and after its passage and approval by the Governor."

If the conditions of the roads are such as they were found and declared to be, their immediate repair is urgent. The emergency clause of Act 5 is as definite as was that clause in Act No. 4 which was sustained in the case of Fulkerson v. Refunding Board, 201 Ark. 957, 147 S.W. 2d, 980. Having an emergency clause the Act was effective when approved by the Governor, subject of course to the right of referendum. In the Fulkerson case as in this, the special election provided for in each Act was held within the time when the Act was subject to the right of referendum, but it may be said here, as it was said in the Fulkerson case, that since a valid emergency clause was attached to Act No. 5, the election provided for therein was properly held without waiting for the expiration of ninety days after the adjournment of the General Assembly.

It is argued that Act No. 5 creates vested rights prohibited by Amendment No. 7 to the Constitution.

Similar objection was made to Act No. 4, § 18 of which reads as follows: "This act shall not create any right of any character, and no right of any character shall arise under or pursuant to it, unless and until bonds authorized by this act shall have been issued and actually sold or exchanged by the board."

It was held in the Fulkerson case supra, as shown in a headnote of that case, that: "Since, under Act No. 4 of the 1941 session of the General Assembly providing for the refunding of the state's highway bonds it is provided that no vested rights shall accrue thereunder until the consent of the people had been given at an election to be held for that purpose, no vested rights can arise until that condition is performed." Act No. 5 has a similar proivsion and must of course be given the same construction. The election had been held, but no bonds have been sold under Act No. 5 so that no one is yet in position to claim that he has any vested right under Act No. 5.

It is insisted that inasmuch as Initiated Act No. 3 had been approved by the electors of the State and was in effect when the bond election was held, that the bond election should have been held in accordance with the provisions of the Initiated Act. It may be answered that Act No. 3 applies only to the election of public officers and to initiated and referred measures.

Act No. 5 is not an initiated measure and has not been referred and does not involve the election of any public officers. Moreover Act No. 5 provides in § 15 thereof that, "The County Boards of Election Commissioners of the several counties of this State, as constituted immediately prior to the last general election, shall hold and conduct this election, anything in Initiated Act No. 3 of 1948 to the contrary notwithstanding, * * *." We hold therefore that the bond election was held pursuant to law.

Upon the insistence that the State has contracted away its police powers, but little need be said. The police power and the taxing power which we hold here has not been exceeded, are different powers. The police power

appertains to such rules and regulations relating to personal and property rights as affects the public health, public safety and public welfare. Bacon v. Walker, 204 U. S. 311, 27 S. Ct. 289, 51 L. Ed. 499; Williams v. State, 85 Ark. 464, 108 S. W. 838, annotated in 26 L. R. A., N. S. 482, 122 Am. St. Rep. 47.

It is the right of the State to regulate all activities within its territorial limits, protecting the public welfare and as applicable here, it is the right of the State to regulate the traffic on the state highways in such matters as speed limits, limiting the weight of vehicles, and regulating the conduct of persons in using the highways, etc. There is nothing in the Act which impairs or restricts the power of the State in these respects, or for that matter relating to those powers.

It may finally be said in answer to appellant's last objection that there has been no contravention of Amendment No. 20 to the Constitution. This amendment provides that except for the purpose of refunding the existing indebtedness of the State and for assuming and refunding valid outstanding road improvement district bonds, the State shall issue no bonds or other evidence of indebtedness pledging the faith and credit of the State, or any of its revenues, for any purpose whatsoever except by and with the consent of the majority of the qualified electors of the State, voting on the question at a general election, or at a special election called for that purpose. But it appears from what has already been said there has been no violation of this amendment, for the reason that the consent of the majority of the qualified electors of the State, voting on the question at a special election called for that purpose, has been given to the proposed bond issue.

A brief has been filed by an *amicus curiae* which deals with the policy of issuing these bonds and raises questions and presents arguments which should have been addressed to the General Assembly and may not be considered by us.

We think Act No. 5 is free from any of the constitutional objections urged against it and the demurrer to

the complaint was properly sustained and the decree is therefore affirmed.

George Rose Smith, J., non-participating.

SCHUMAN *v.* CHERRY.

4-8851 220 S. W. 2d 817

Opinion delivered May 23, 1949.

Rehearing denied June 13, 1949.

Wm. J. Kirby and *U. A. Gentry,* for appellant.

Tilghman E. Dixon, J. H. Carmichael, Jr., and *J. H. Carmichael, Sr.,* for appellee.

ED. F. MCFADDIN, Justice. This appeal stems from the effort by appellees, as heirs of the original property owner, to have their title declared superior to that of appellant, Ed Pinkert, who holds by mesne conveyances from the improvement district which purchased the property at the commissioner's sale for the foreclosure of the delinquent assessments.

The three vacant lots here involved were situated in Sewer Improvement District No. 94 of Little Rock (hereinafter called district). In June, *1927,* the district filed suit in the Pulaski Chancery Court to foreclose the district's lien for the delinquent assessments due on the three lots. Other properties (over 340 tracts in all) were included in the same suit, and the foreclosure decree was not rendered until November, *1937,* being more than ten years after the suit had been filed. The said foreclosure decree recites, as regards service:

"And it appearing to the court that due service of process has been had upon each of the defendants, for the time and in the manner prescribed by law, . . . and that a list of all delinquent property in plaintiff improvement district, for the assessments levied for the various years from 1924 to 1934, inclusive, by warning order of notice of the pendency of this suit, has been given by publication for four consecutive weeks, listing the names of the last known owners, the lots, blocks, parcels and land and other property in said district, and the amounts due thereon, for the years against which said property is delinquent."

From the above recital it appears that there was not only (a) service on the delinquent property owners as required by the law when the suit was filed in 1927, but also (b) service by publication as required by the

law when the decree was rendered;[1] so no question is posed in this case as to the sufficiency of the service in the foreclosure suit. The benefits on these three lots were unpaid from 1924 to 1934, inclusive; the delinquent assessments totaled $130.20 and the penalty was $26.04. In the foreclosure sale conducted by the commissioner in chancery, the district bid for the three lots the said amount of the delinquent assessments, penalty and costs; and a certificate of purchase was issued to the district.

In 1943, this certificate of purchase—with the approval of the chancery court—was sold to James Newsome for $5.50. This sale and the circumstances surrounding it will be discussed in topic II, *infra.* During the period allowed by law for redemption,[2] the said certificate of purchase was transferred by Newsome to Jack Barry, and by Barry to W. I. Stout, trustee. On October 12, 1943, the commissioner in chancery executed to W. I. Stout, trustee, the deed which described the three lots here involved; and that deed was on the same day acknowledged in open court and approved by the chancery court, and delivered to W. I. Stout, trustee. In 1944, for a valuable consideration, Stout conveyed the three lots to Ed Pinkert, one of the appellants in this court. The other appellant, here, is Manie Schuman, who claimed under a tax title now conceded to be void, so Pinkert is the real appellant and the only one with an interest. We will hereinafter refer to him as "the appellant."

On April 10, 1948, the appellees herein filed the present suit, and alleged (a) that the three lots were sold for a wholly inadequate price at the foreclosure sale; and (b) that the assignment of the certificate of purchase from the district to Newsome for $5.50 was

[1] Section 5673, *et seq.*, Crawford & Moses' Digest, prescribed the type and manner of service in municipal improvement district foreclosures in 1927. Act 207 of 1937 (now found in § 7311, *et seq.*, Pope's Digest) was in effect when the decree was rendered in November, 1937.

[2] The district in this case was a municipal improvement district, and the period for redemption of such district when organized under the general statute, is five years from the date of sale, as explained in Hopkins v. Fields, 202 Ark. 890, 154 S. W. 2d 22. This will be discussed in topics II and III, *infra.*

wholly void, not only because of price, but also because of the intervention of a receiver appointed by the chancery court. The case was heard on oral and documentary evidence, and a decree was rendered on September 23, 1948, adjudging the title to the three lots to be in the appellees, free of all claims of appellant. This appeal challenges that decree.

From the foregoing recitals it appears that there was a long-delayed foreclosure suit by a municipal improvement district; a sale of the three lots to the district for the delinquent assessments, penalty and costs; a transfer of the certificate of purchase during the period of redemption; the expiration of the period of redemption; a deed by the commissioner in chancery to the holder of the certificate of purchase; the approval of said deed by the court; and the delivery to the grantee. The burden was on the appellees as plaintiffs in the trial court to show fatal defects in the proceedings of foreclosure. We therefore consider the contentions relied on by the appellees.

I. *Amount for Which the Property was Sold at the Foreclosure Sale.* The three vacant lots here involved were worth at least $1,800 at the time that they were sold to the district at the foreclosure sale for $156.24. Appellees claim that the sale was void because of this inadequacy of price; but we find this contention to be without merit. In Nash v. Delinquent Lands, 111 Ark. 158, 163 S. W. 1147 it was claimed that an improvement district foreclosure sale was void because the land was sold for an inadequate price. In denying that contention, we said:

"The law authorized the lands to be proceeded against 'for the collection of such assessments, installments, interest and fee and costs due thereon.' There was no evidence tending to show that the lands were offered for sale or sold for less than the amount owing and due thereon, as declared by the court in its decree. Where the law authorizes land to be sold for taxes, penalty, interest and costs as determined by the court in its decree to be due against the lands, if the lands,

when offered at public sale upon open and free competitive bidding, bring no more than that amount, it cannot be said that the purchaser who offers such amount for the lands, and whose offer has been accepted, has paid an inadequate price."

Furthermore, section 5 of Act 207 of 1937 (as found in § 7317, Pope's Digest) says of improvement district foreclosure sales: "At such sale if there be no purchaser offering as much as the total tax or assessment, plus penalty, interest and all costs and attorney fees allowed, then said property shall be struck off to the plaintiff." The holding in the foregoing case, as well as the plain wording of the quoted statute, shows that all that a district is required to bid at a foreclosure sale is the amount of the delinquent assessment, penalty and cost. Such was the bid of the district in this case; and no fraud or collusion is alleged, so the appellees cannot now be heard to claim that the property was sold for an inadequate price at the foreclosure sale.[1]

II. *Appellees' Claim Regarding the Receivership.* After the purchase of the three lots at the foreclosure sale, and pending the period of redemption, the district filed a petition in the foreclosure suit praying that the chancery court appoint a receiver to take charge of the properties sold (there were over 340 tracts involved in the sale), and to collect the rents thereon. The chancery court did appoint such a receiver, and the order of appointment (on June 1, 1938) directed the receiver: ". . . after he shall have taken the oath required by law, and shall have executed a bond in the sum of $2,000, to take in charge and into his custody the property described in the order of confirmation entered in this case, together with all improvements thereon; . . ."

For some reason not explained in this case, the commissioners of the district delivered to the receiver the certificates of purchase received by the district at the foreclosure sale; and when the court approved the sale

[1] Section 9479, Pope's Digest, has not been overlooked. Even if it be valid and in force at the present time, it relates only to mortgage foreclosures, and does not affect sales by an improvement district, as is the situation here.

of the said certificates of purchase to James Newsome, it was done on the petition of the receiver. The said court order of August 20, 1943, reads:

"On this day is presented to the court the petition of the receiver, in which it is stated that he has been offered the sum of five and 50/100 ($5.50) dollars for each and every certificate of purchase outstanding in this suit and owned by the district. And the court, being well and sufficiently advised as to all matters of fact and law arising herein, doth hereby authorize the receiver to accept said bid from one James Newsome, to receive the money therefor, and to turn said money over to this court until further orders."

Appellees claim that the order appointing the receiver was void, and that such invalidity tainted all the proceedings in this case, and rendered null and void not only the sale of the certificates to Newsome, but also the deed executed by the commissioner in chancery to Stout, trustee. Appellees cite and strongly rely on Act 79 of 1933 (found in §§ 6540 and 7336, Pope's Digest, and § 20-1120, Ark. Stats. of 1947), which Act forbids the appointment of a receiver to collect the taxes due municipal improvement districts. The Act was fully discussed by this Court in Rogers Paving Dist. v. Swofford, 193 Ark. 260, 99 S.W. 577, which also is a case strongly relied on by appellees.

Even if—for the sake of argument and without deciding the question—we treat as void the appointment of the receiver in this case, nevertheless, the chancery court could have approved the sale of the certificates of purchase to Newsome without any receivership. The petition requesting such sale might just as well have been made by the commissioners of the district, or someone other than the receiver. The appointment of a receiver did not in any wise affect or render void either the foreclosure decree or the purchase of the property by the improvement district. Appellants gain nothing by their present contention, because the title to the lots would be in the district even if we should ignore the receivership, the sale of the certificates and the deed to Stout; and

with the title in the district, appellants could not now redeem. In the case of Hopkins v. Fields, 202 Ark. 890, 154 S.W. 2d 22 we held that the time allowed a property owner to redeem, from a municipal improvement district foreclosure sale, was five years from the date of the sale. Appellees did not offer to redeem or file the present suit until nearly ten years from the date of the foreclosure sale. We therefore hold that the appellees' argument about the appointment of a receiver is without effective application to this case.

III. *The Sale Price of the Certificates.* Appellees contend that the sale of the certificates (totalling $156.24) to Newsome for $5.50 was so grossly inadequate as to constitute fraud; and appellees cite and rely on the cases of Eddy v. Schuman, 206 Ark. 849, 177 S.W. 2d 918 and Schuman v. Eddy, 207 Ark. 925, 184 S.W. 2d 57. These cases give the appellees no comfort. There, a property owner in the district claimed that the action of the commissioners had prejudiced the rights of all the property holders, and the prime purpose of the litigation was to protect the interests of the district and the property holders.

In the present suit, the district and the commissioners are not parties: so the Schuman-Eddy cases are not in point. Appellee's purpose is not to protect the rights of the district and property holders, but to obtain a title for the appellees. Again—for the sake of argument and without deciding the question—if we concede that the sale of the certificates to Newsome should be set aside, still that holding would return the certificates to the district and would not benefit the appellees, because—as heretofore stated—they had only five years from the foreclosure sale in which to redeem. See Hopkins v. Fields, 202 Ark. 890, 154 S.W. 2d 22. The time for redemption has long since expired, so appellees are not benefited, whether the title to the three lots be in the appellant or in the district.

What was said in Shinault v. Wells, 208 Ark. 198, 186 S.W. 2d 26 is apropos here. In that case an attack was made on a deed executed by an improvement district. We said:

"We conclude, therefore, that Mrs. Mitchell did not have title when she filed her intervention, having lost it through the foreclosure proceedings above referred to, and her daughter, in whose name the proceedings were revived, acquired no greater title or interest by inheritance from her mother than the mother herself possessed. The decree must, therefore, be reversed, and the cause will be remanded, with directions to dismiss the intervention as having been filed by a person who had no title to or interest in the lots at the time the intervention was filed."

Appellees in the case at bar failed to redeem within the time allowed by law, and so they have no title to or interest in the lots.

The decree of the chancery court is reversed, and the cause is remanded with directions to dismiss the complaint of appellees, and to adjudge all costs against them.

KYLE *v.* ZELLNER.

4-8874 220 S. W. 2d 806

Opinion delivered May 23, 1949.

Hopson & Hopson, for appellants.

Warren E. Wood and *Griffin Smith, Jr.,* for appellee.

George Rose Smith, J. In 1945, for a consideration of $1,000, the appellee conveyed to the appellants, Kyle and Fehr, all the "merchantable" cypress timber on eighty acres of land, together with such smaller timber as might be needed for skid poles. Appellants were given two years in which to remove the timber. The chancellor found that they cut about 280,000 feet of cypress, which they sawed into lumber and sold for $67 a thousand feet.

After the timber had been cut the appellee became dissatisfied with the transaction and brought this suit to cancel the deed and to obtain an accounting. She alleged that Kyle was her employee when the trade was made and that she relied on him to negotiate with D. Goodwin, a prospective buyer of the timber. According to the complaint Kyle falsely reported that Goodwin offered only $750 for the timber, and in reliance upon that report the appellee sold the cypress to the appellants for $1,000 without making an independent investigation of its value. It was averred that the timber was worth far more than that sum and that Kyle had violated his fiduciary duty as an agent in order to obtain it for himself and Fehr.

At the trial appellee's proof failed to sustain the allegations of her complaint. The evidence showed that Goodwin had in fact offered only $750 for the cypress and that there was no breach of any fiduciary duty on Kyle's part. The chancellor found, however, that merchantable timber was intended by the parties to mean timber at least twelve inches in diameter at the stump and that appellants had cut 180,000 feet of smaller logs to which they were not entitled under their deed. The appellee was given judgment for $1,495, being the stumpage value of this smaller timber less a set-off conceded by appellee.

At the close of the plaintiff's testimony the appellants moved unsuccessfully for a dismissal and now insist that the appellee had not then made a *prima facie* case. It is unnecessary to decide this question. We have held that our practice does not recognize a demurrer to the evidence; in equity the defendant must either submit the case upon the plaintiff's proof or proceed with his own testimony. *Kelley* v. *Northern Ohio Co.*, 210 Ark. 355, 196 S.W. 2d 235. These appellants chose to present their evidence and thus abandoned their motion to dismiss.

It will be seen that the chancellor's decision did not follow the plaintiff's theory of the case as set forth in her pleadings. The appellants contend that the proof was not fully developed as to the meaning of the term "merchantable" and that the trial court erred in adopting a theory at variance with the complaint. Doubtless the chancellor treated the pleadings as amended to conform to the proof. If the appellants desired to adduce additional evidence on this issue their remedy was by motion to reopen the case for that purpose. The trial court must first be given an opportunity to correct asserted errors. By taking an appeal instead of seeking to reopen the case the appellants have elected to submit the cause to us upon the record made below.

There was actually a great deal of testimony as to the meaning of "merchantable." Goodwin's offer was based on his belief that there were about 100,000 feet of

merchantable cypress on the tract, by which he meant trees at least twelve inches thick. Kyle himself was asked to define merchantable timber and replied, "All I have heard, twelve inches and up is merchantable timber." Others testified to the same effect. Although some of appellants' witnesses considered that merchantable meant any timber that could be used—even brush—this would render the word meaningless in the deed. We agree with the chancellor in holding that the term was not used idly, that its purpose was to limit the sale to trees at least twelve inches in diameter. The reference in the deed to smaller timber to be used as skid poles confirms this interpretation.

The most difficult question is whether the evidence supports the chancellor's computation of damages. The measure of damages for the destruction of young growing trees is the difference in the value of the land with and without the trees. *St. L. I. M. & S. Ry. Co.* v. *Ayres,* 67 Ark. 371, 55 S.W. 159; *Bradley Lbr. Co.* v. *Hamilton,* 117 Ark. 127, 173 S.W. 848. If that rule is applicable the decree is without supporting evidence, for there was no testimony as to land values.

The rule is evidently intended to compensate the landowner when his timber is so immature that its value in the market is materially less than its potential worth through continued growth. Even though these litigants used the word merchantable to mean twelve inch trees, it does not necessarily follow that smaller trees had value only as an investment for the future. The best indication to the contrary lies in the fact that appellants did mill these logs and sold the lumber for a uniform price of $67 a thousand feet. While the timber was not merchantable in the restricted sense in which the parties used that term, it clearly had a market value that was realized by the appellants. There is not much direct proof that appellants actually cut trees under twelve inches at the stump, the testimony being largely confined to diameter at the small end of the logs; but the inference may be drawn that smaller trees were removed. There were estimates that the tract contained about 100,000 feet of merchantable cypress; so the total of 280,000 feet

cut by appellants must have included timber not conveyed by the deed.

Both sides assail the amount of the judgment, appellants contending that it is excessive and the appellee urging on cross appeal that it is inadequate. The trial court fixed the stumpage value of the timber wrongfully cut at $10 a thousand feet. The witnesses' estimates ranged from a minimum of $4 to a maximum of $15 for merchantable timber. We cannot say that any revision by us, either upward or downward, would be better supported by the proof than is the figure adopted by the chancellor.

Affirmed.

GRIFFIN SMITH, C. J., not participating.

ELLIS *v.* CARROLL, ADMINISTRATOR.

4-8890 220 S. W. 2d 800

Opinion delivered May 23, 1949.

Manuel M. Wiseman and *Hal B. Mixon*, for appellant.

Sharp & Sharp, for appellees.

GEORGE ROSE SMITH, J. Appellant, Oina Fisher Ellis, brought this action against the personal representative and heirs of Mary E. Lawson to enforce an alleged oral contract by which Mrs. Lawson agreed to leave part of her estate to appellant. The contract is said to have been made in December, 1911, between Mrs. Lawson and

Hamp Fisher, appellant's father. Appellant was then a thirteen-year-old girl. Fisher testified that Mrs. Lawson asked him to let Oina live in her home and work for her until the child was grown and married. Fisher assented to the arrangement upon the understanding that Mrs. Lawson would devise to Oina an heir's share in her estate. As Fisher put it, Mrs. Lawson agreed that Oina would receive a share equal to that of Mrs. Lawson's brother, who was then living, or to that of any of her nieces. It is conceded that Oina did move to Mrs. Lawson's home and worked there until her marriage about five years later. Mrs. Lawson died in 1947 without having made a will, and this action was brought to enforce the contract against her five surviving nieces.

The chancellor correctly held that the agreement was not proved by clear and convincing evidence. Even Fisher's version of the arrangement is somewhat indefinite, for the interest of Mrs. Lawson's brother would not have been the same as that of any of her nieces. Fisher's testimony is contradicted by a disinterested witness, Moody, who was present when the transaction occurred and says that it was Fisher who asked Mrs. Lawson to take Oina into her home. According to Moody, Mrs. Lawson was actuated by sympathy for the girl, whose own home is shown not to have been a good environment for a young child. Several other witnesses ascribed the same motive to Mrs. Lawson's action, and none of them had heard any mention of an agreement making Oina an heir. Moreover, it was proved that Mrs. Lawson later befriended two other young girls in the same manner. Neither of these recipients of her generosity has come forward with a claim like that advanced by appellant. In view of all the circumstances we are not convinced that the asserted contract was ever made.

Affirmed.

4-8884 220 S. W. 2d 608

Opinion delivered May 23, 1949.

C. E. Izard, Wilson & Starbird and *Hardin, Barton & Shaw,* for appellant.

Daily & Woods, for appellee.

ED. F. MCFADDIN, Justice. In this action on account for $113.42 the parties have injected questions of venue, partnership, sales, payment, evidence and trial practice. Fortunately for those who favor short opinions, we are able to bypass some of the questions presented.

The facts are fairly simple. In 1945, the appellants, Myers and Arnold, entered into a contract for growing

beans, by the terms of which contract (1) Myers was to furnish the bean seed and fertilizer, (2) Arnold was to furnish the land and labor, and (3) the gross sales price received from the harvested bean crop would be divided equally between Myers and Arnold. Myers did furnish some of the fertilizer, but when, on August 26th, Arnold went to him for additional fertilizer, Myers had none on hand; so he ordered 50 sacks of nitrate of soda from the appellees (doing business as the Fort Smith Cotton Oil Company). This purchase amounted to $113.42, and payment thereof is the reason for this action.

Myers did not deny that he ordered the fertilizer, and Arnold admitted receiving it. The proof showed that, at Myers' request, Arnold had the trucking firm of Stewart & Wofford to obtain the 50 sacks of nitrate from appellees and deliver same to Arnold's farm, where the nitrate was used on the Myers-Arnold bean crop. When Stewart (of the trucking firm) received the nitrate, it was billed to Arnold. Later Arnold refused to pay the bill, claiming that under the Myers-Arnold contract it was Myers' duty to furnish the fertilizer. Some time later when the account was presented to Myers he also refused payment, claiming that all items charged by appellees to him had been paid previously. Thereupon appellees filed this action against both Arnold and Myers in the Sebastian Circuit Court to collect the said sum of $113.42. Myers was served with process in Crawford county and he duly objected to the venue. His plea was overruled. A trial to a jury resulted in a verdict and judgment against both Myers and Arnold for the full amount; and this appeal challenges that judgment.

In the course of the trial neither Arnold nor Myers objected to the action of the court in giving Arnold's instruction No. 3 as modified (and as found on page 109 of the transcript). It reads:

"Gentlemen of the jury, plaintiffs, R. A. Lillard and others, have sued the defendants, W. D. Arnold and J. W. Myers jointly and as individuals, for the purchase price of 50 sacks of soda, of the value of $113.42, which they allege was sold to the defendants, at the defendants'

special instance and request, on or about August 27, 1945.

"The defendants have denied each and every material allegation in plaintiffs' complaint and deny that they were jointly liable, but allege that they were share-croppers engaged in the raising of certain vegetables on the day and date complained of. The defendant, J. W. Myers, admits that, under the terms of his agreement with W. D. Arnold in said share-cropping arrangement, it was his duty to furnish fertilizer to be used in said share-crop operation, and defendant, J. W. Myers, further admits that he purchased from plaintiffs said 50 sacks of soda, as an individual.

"These facts constitute the issues in this case, and the Court instructs you that the burden of proof is upon the plaintiffs to prove that the purchase was made by the defendants, on the day and date alleged in the complaint, and has not been paid for; *that the joint venture existed between the parties upon said date,* and unless the plaintiffs prove each of these facts to your satisfaction, by a preponderance of the testimony, your verdict should be for the defendant, W. D. Arnold." (italics our own)

We have copied this instruction in full for several reasons:

First. It was not objected to by either appellant, so it became the unchallenged basis for the jury's verdict. McFadden v. Richards Med. Co., 170 Ark. 1011, 282 S.W. 353.

Second. It was not abstracted by either appellant; and such failure to so abstract this instruction [1] justifies this Court in failing to consider the trial Court's refusal to give other requested instructions. Harrelson v. Eureka Springs, Elec. Co., 121 Ark. 269, 181 S.W. 922; Morris v. Raymond, 132 Ark. 449, 201 S.W. 116; and see, also, other cases collected on page 146 in the 1948 volume entitled, "Supreme Court Procedure," published by C. R. Stevenson.

[1] Arnold's requested instruction No. 2 found on page 107 of the transcript is also omitted from all the abstracts.

Third. This instruction—without objection of appellants—listed the matters that appellees were required to prove, as being: the purchase, failure of payment, and existence of a "joint venture" between the appellants. The evidence, when viewed in the light most favorable to the appellees, is sufficient to support the jury verdict on each of the three points that the plaintiffs were required to prove by the said instruction.

Therefore, it is unnecessary for us to decide what relationship existed between Myers and Arnold, or even to discuss the various relationships which might be thought to have existed, since neither appellant objected to the instruction which referred to their efforts as a "joint venture." Such quoted words, in effect, submitted to the jury the question of whether the defendants were joint adventures. See 33 C.J. 841; 48 C.J.S. 801; 30 Am. Juris. 675 and annotation in 138 A.L.R. 968. The verdict found the appellants to be joint adventurers; and joint adventurers may be jointly and severally liable to third parties for the debts of the adventure. See 33 C.J. 871, 48 C.J.S. 873, 30 Am. Juris. 699.

Likewise, Myers' plea as to venue is settled by the jury's verdict based on the said instruction; because Myers, as a joint adventurer with Arnold, was jointly liable with him, and therefore could be sued in Sebastian county, where Arnold was sued and served with process. See Gibson v. Talley, 206 Ark. 1, 174 S.W. 2d 551.

The judgment of the circuit court is in all things affirmed.

OBENNOSKEY *v.* OBENNOSKEY.

4-8888 220 S. W. 2d 610

Opinion delivered May 23, 1949.

Oscar Barnett, for appellant.

R. D. Rouse, for appellee.

MINOR W. MILLWEE, Justice. Appellee, Bonnie Mae Obennoskey, instituted this suit against the appellant, Hoail Allen Obennoskey, for a divorce on the grounds of personal indignities and cruelty. Appellee also asked for custody of their six months old child and a second unborn child she was expecting, and for support and suit money.

Appellant filed an answer denying the material allegations of the complaint and alleging that the trouble between the parties was the result of her parents trying to force appellee and appellant to make their home with the parents.

At the trial held in September 13, 1948, appellee offered the testimony of herself, her parents and three physicians. Appellant offered no evidence, but prosecutes this appeal from a decree awarding appellee a

divorce, custody of their two children, aged 16 months and two months, respectively, and $35 per month for the support of the two children.

At the time of their marriage at Benton, Arkansas, in April, 1946, appellant was 26 years of age while appellee was only 15 years of age. Appellant was regularly employed as a sawmill worker and on April 1, 1947, the couple moved to Stamps, Arkansas, where their first child was born on May 1, 1947. On June 1, 1947, the parties moved to Hope, Arkansas, where appellant became employed. Appellee suffered from a female disorder following the birth of her first child which rendered sexual intercourse extremely painful and dangerous to her health. Appellant not only refused to provide medical attention for appellee, but forced her to submit to incessant and excessive acts of sexual intercourse which impaired her health. We omit a detailed recital of the morbid and delicate matters relating to the physical agony and mental anguish suffered by appellee because of the compulsory and excessive sexual demands of appellant from June 1, 1947, to June 28, 1947. When appellee left appellant June 28th and returned to the home of her parents at Stamps, Arkansas, she was ill and her nervous system prostrated. After returning to Stamps, appellee's health rapidly improved under the treatment of a physician who advised her to abstain from sexual intercourse until her condition was fully corrected.

On or about August 1, 1947, appellant came to Stamps and requested appellee to move with him to Prescott, Arkansas, where he had obtained employment. Appellee consented upon appellant's promise to refrain from his prior misconduct. Appellant failed to live up to his promise and resumed the mistreatment which was continued until October 22, 1947, when appellee again left him and filed the instant suit on November 3, 1947.

It was shown without contradiction that appellee was in good health when she married appellant and that on each of the occasions that she was forced to leave appellant she was broken in health, but rapidly

recovered as soon as she ceased cohabiting with him. Appellee was pregnant when she left appellant the last time and their second child was born July 8, 1948.

For reversal of the decree appellant first insists that appellee was only 17 years of age at the time of the filing of the instant suit and was, therefore, without capacity to maintain the action. Appellant relies on the case of Davie v. Padgett, 117 Ark. 544, 176 S. W. 333. In that case the court construed Ark. Stats. (1947), § 27-823, which provides that the action of an infant must be brought by a guardian or next friend, and held that the incapacity of an infant to sue in his own name may be waived and is waived by the defendant's failure to take advantage of the defense either by demurrer or answer as provided in Ark. Stats. (1947), § 27-1119. Here appellant waived the objection that appellee was an infant by pleading to the merits without raising the objection in the trial court and that question may not be raised for the first time on appeal. Barnett v. McClain, 153 Ark. 325, 240 S. W. 415. Moreover, appellee became 18 years of age several months before the trial and was empowered to proceed in the capacity of an adult when the decree was rendered. Coca-Cola Bottling Co. v. Davidson, 193 Ark. 825, 102 S. W. 2d 833.

It is next contended that excessive sexual intercourse is not a ground for divorce under Arkansas law. While this court has not passed on the question, it is well settled by the authorities generally that excessive sexual demands of a husband, injurious to the health of the wife, to which she is compelled to submit, constitute cruelty entitling the wife to a divorce. 27 C. J. S., Divorce, § 30; 17 Am. Jur., Divorce and Separation, § 76; Schouler Divorce Manual, § 89; Keezer, Marriage and Divorce (3rd Ed.), § 362.

The facts in the instant case are like those in Hines v. Hines, 192 Iowa 596, 185 N. W. 91, where the court said: "A wife has the right to protect her health and her life from the ungoverned lust of her husband by seeking a divorce. Such an action presents as strong a case for relief as when she flees from his intolerable

cruelty inflicted by other means. It is personal violence under another name, and cannot be justified under the claim of the exercise of his marital rights. These rights are reciprocal, and exist on the part of the wife as distinctly as on the part of the husband. It is true that marital rights involve marital duties, and include the duty of forbearance on the part of the husband at the reasonable request of the wife, as well as the duty of submission on the part of the wife at the reasonable request of the husband. In the decision of such matters a court must take into consideration the duty of the husband as well as the duty of the wife. To unduly emphasize either would be manifestly unjust."

A spouse may be guilty of "cruel and barbarous treatment" under our statute (Ark. Stats. 1947, § 34-1202) without the infliction of blows. The test is stated in Kientz v. Kientz, 104 Ark. 381, 149 S. W. 86, as follows: "In order to constitute cruel treatment, which our law recognizes as ground for divorce, there must be proof of willfulness or malice on the part of the offending spouse, and the effect of that treatment must be to impair or threaten the impairment of the complaining party's health or such as to cause mental suffering sufficient to make the condition of the complaining party intolerable." We conclude that appellee has met this test and that appellant's mistreatment constituted cruelty within the meaning of our statute.

It is next argued that the testimony of appellee is uncorroborated and that the evidence is, therefore, insufficient to support the decree. In Hines v. Hines, supra, the wife's testimony concerning excessive sexual demands of her husband was held sufficiently corroborated by proof that, prior to leaving her husband, she was in poor health and suffering from vaginitis, which had not responded to medical treatment, and that upon complying with her physician's requirement of temporary separation, the medical treatment was successful and health returned. See, also, McAllister v. McAllister, 28 Wash. 613, 69 Pac. 119.

In Morgan v. Morgan, 202 Ark. 76, 148 S. W. 2d 1078, we approved the rule stated in 17 Am. Jur., Divorce and Separation, § 386, as follows: "It is not necessary that the testimony of the complaining spouse be corroborated upon every element or essential of his or her divorce. It has been said that since the object of the requirement as to corroboration is to prevent collusion, where the whole case precludes any possibility of collusion the corroboration only needs to be very slight." See, also, Goodlet v. Goodlet, 206 Ark. 1048, 178 S. W. 2d 666.

The testimony of appellee relative to the excessive sexual demands of appellant was amply corroborated by the testimony of appellee's parents and three physicians who treated appellee. This evidence established the fact that appellee suffered from a female disorder; that excessive sexual intercourse would result in the suffering experienced by appellee and that her broken condition of health rapidly improved upon each occasion that she left appellant. It was also shown by the testimony of appellee's parents that appellant refused to provide proper medical attention for appellee and that he promised to refrain from previous sexual abuses when appellee agreed to live with him at Prescott, Arkansas.

Appellant also contends that the return of appellee to the home at Prescott in August, 1947, amounted to condonation of the charges of cruelty and indignities. The undisputed evidence discloses that appellee resumed the marital status with appellant upon the express condition that he would refrain from past misconduct and with proper respect for the condition of her health. Appellant broke his promise and resumed the former mistreatment which thereby impaired the health of appellee to the point of endangering her life if it had been continued. Condonation for the offense of cruel and barbarous treatment is only conditional forgiveness and if the offense be repeated, it revives the right of action. In other words, the voluntary cohabitation with complete forgiveness will condone prior cruelty only so long as the prior offense is not repeated. 17 Am. Jur., Divorce and Separation, § 202; Longinotti v. Longinotti,

169 Ark. 1001, 277 S. W. 41; Denison v. Denison, 189 Ark. 239, 71 S. W. 2d 1055; Franks v. Franks, 211 Ark. 919, 204 S. W. 2d 90. In the Longinotti case the court said: "The law is well settled that either spouse may condone conduct of the other which, but for the condonation, would entitle the innocent spouse to a divorce. But it is equally as well settled that condonation does not deprive the aggrieved spouse of the right to a divorce on account of the subsequent misconduct of the offending spouse. On the contrary, subsequent misconduct will generally operate to revive the right to a divorce for the condoned offense." If the condition upon which cohabitation is resumed is broken by further misconduct, condoned past conduct may then be relied on in support of an action for divorce. Franks v. Franks, supra. Under the uncontradicted evidence here the doctrine of condonation has no application.

The decree is correct and is affirmed.

HENDERSON v. CALION LUMBER COMPANY.

4-8850 220 S. W. 2d 597

Opinion delivered May 23, 1949.

Crumpler and Eckert and *Surrey E. Gilliam*, for appellant.

J. Ed Morneau, for appellee.

GRIFFIN SMITH, Chief Justice. Workmen's Compensation Commission found that Will Henderson's death in September 1943 was not caused by an accident arising out of and in the course of his employment by Calion

Lumber Company.[1] Circuit Court affirmed, and Nettie Henderson, the decedent's wife, has appealed. Here, as in the court below, it is contended that the Commission acted on insufficient evidence.

Henderson, 60 years of age, did light work at a sawmill, where he had been employed for six weeks. On September 28th he went to the mill shortly before eight o'clock and spent part of the morning handling sticks used in stacking lumber. His wife testified that he returned home at 11:45, complaining of injuries received in a fall. Nettie's version of Will's conversation was that he and another man were attempting to move a wagon, and in straining at a wheel [Will] lost his balance. Nettie exhibited a pair of torn overalls she said Will wore when he came home.

Nettie admitted that her husband had often complained of chest pains when the day's work had been unusually hard, but she did not know he suffered from heart trouble. After remaining at home an hour, Will started back to the mill and had reached a point fifty or a hundred feet from his destination when he fell and died.

There was other testimony supporting what Nettie said Will told her regarding the alleged fall. On the other hand, a worker who was assisting Will in handling the lumber sticks testified in a manner completely at variance with the theory of traumatic injury. This witness stated positively that nothing of the kind occurred.

If the Commission had believed witnesses who testified regarding Nettie's claim that Will fell, or statements of those who testified to facts inferentially sustaining this theory, an award could have been affirmed. Medical opinion was that unusual exertion such as the claim of a strain and fall, could have produced a climactic coronary condition.

But the Commission did not credit these witnesses, for it expressly found that "no accidental injury was sustained." This belief was emphasized by the Commission's comment that Act 319 of 1939 was not

[1] The suit was for the benefit of Nettie Henderson and three minor children.

intended as life insurance, ". . . and does not compensate for the effect that ordinary physical exertion has on the body as ordinary wear and tear".

Affirmed.

COLE *v.* WILLIAMS.

4-8872 220 S. W. 2d 821

Opinion delivered May 30, 1949.

Ralph Morrow, Charles Jacobson, J. R. Booker and *Jno. S. Gatewood,* for appellant.

Chas. B. Thweatt, Harold Flowers and *Phillip McNemer,* for appellee.

HOLT, J. The parties to this litigation, which involves the title to a 160 acre farm in Lonoke county and six lots in England, Arkansas, are all Negroes.

Appellants are the only heirs of Scipio A. Jones and Lillie M. Jones, his wife. Jones was a practicing attor-

ney in Little Rock until shortly before his death in 1943. His widow became executrix of his estate and filed her final report June 5, 1945, and was discharged. Lillie Jones died intestate August 6, 1945, and her administrator filed his final report April, 1948, and was discharged.

Appellants began the present suit in ejectment April 24, 1948, against appellee, John Williams, and by agreement, the cause was transferred to equity.

The complaint alleged, in effect, title in appellants to all the property involved by virtue of (1) a Commissioner's deed in 1928 to Lillie M. Jones following sale of the property in a foreclosure suit by the Bank of England against Williams, (2) by a court order in 1938, in which it was directed, in a judicial sale to enforce a certain mortgage lien of G. W. Morris, that such sale should not foreclose any interest of Lillie Jones in the property, and (3) a certain court order in 1941 in a foreclosure suit of the Federal Land Bank of St. Louis against Williams, finding that Lillie Jones is the "owner and title holder of record" of said property.

It is further alleged that Lillie Jones "permitted defendant (John Williams) to occupy and farm the property, keep it up and pay the taxes and interest, for said use and occupancy."

Appellee answered denying that appellants had title, or any right to the possession, and alleged specifically that he was the beneficial owner of all of said property and that on account of the relationship and an agreement between him and his attorney, Scipio Jones, an implied trust existed and that the title of appellants, as heirs of Lillie Jones, is that of a trustee only. His prayer was that title to all property involved be quieted and confirmed in him, appellee, free of all claims of appellants.

September 3, 1938, the heirs of G. W. Morris, deceased, filed intervention alleging, in effect, that on December 3, 1930, appellee, Williams, and wife, executed and delivered to G. W. Morris a mortgage on the land involved to secure payment of a debt; that this mortgage was foreclosed in 1938 and the decree revived in 1948

in the case of Morris v. Williams; that no sale was had under these decrees, and that there is pending in that case petition for order of sale and foreclosure of all rights of the heirs of Lillie Jones and prayed that this foreclosure suit of Morris v. Williams be consolidated with the present suit for the purpose of trial only.

The trial court consolidated the cases for the purpose of trial and found, in effect, that a trust relationship existed, that the legal title of the heirs of Lillie Jones is that of a trustee only and that appellee, Williams, is the beneficial owner of the property involved, and devested all title out of appellants, Lillie Jones' heirs, and vested same in appellee subject to all rights of the intervening heirs of G. W. Morris, as adjudged in a separate decree the same day rendered in said case of Morris v. Williams.

This appeal followed.

Appellants say: "The sole issue for determination on this appeal is whether Lillie M. Jones, the record owner, held title for the benefit of appellee, his contention being that a resulting trust existed in his behalf."

The essential facts, in addition to what has been said before, were: Scipio Jones was appellee's attorney. There was a stipulation to the effect that G. W. Morris died intestate August 14, 1941, his estate administered, closed, and interveners are his sole heirs, that the property involved was a 160 acre farm in Lonoke county and six lots in England.

"December 1, 1925, John and Ella Williams mortgaged said lands to Norman as trustee for Bank of England to secure a loan of $2,300. This trust deed was foreclosed." The property sold to Lillie Jones for $1,354.37, the sale approved and confirmed and deed executed to Lillie Jones on March 23, 1928, and recorded.

That "on June 1, 1919, John Williams executed to Federal Lank Bank of St. Louis a mortgage (on farm land involved) all in Lonoke county, Arkansas, to secure the payment of a note for $6,000 bearing interest at the rate of 5½% per annum, payable in 68 equal semi-annual

installments of $195 each and one installment of $194.81 due on each December 1 and May 1 thereafter until said note is fully paid."

"On June 1, 1923, John Williams executed a deed of trust to a trustee for Mosaic Templars of America, which was filed for record June 22, 1923, is recorded in Book 77 at page 417, and conveys all of said land and Lot 21, Block 21, Lots 16, 17, 18, Block 66 and Lots 11 and 12 and south half Lot 9, Block 67, Town of England, to secure the payment of a note for $6,489, bearing interest at the rate of 7% per annum, payable $2,163 on June 1 of each of the years 1924, 1925, 1926; his wife, Ella Williams, joined him and released all her dower and homestead rights in each of said conveyances.

"The above two conveyances constituted the only liens of record against said land at the time of the sale of said land to Lillie M. Jones on March 10, 1928, at the price of $1,354.37, by the commissioner in Chancery pursuant to the foreclosure decree of December 30, 1927, in the case of Bank of England v. John Williams, et al, and at all times thereafter until after commissioner, on March 23, 1928, executed a deed conveying all of said land to Lillie M. Jones pursuant to said sale, and until after said deed was acknowledged and filed for record on December 22, 1928."

Mr. Meurer, the representative of the Federal Land Bank, testified that the balance due on the Land Bank mortgage, June 20, 1948, was about $3,200. The gross value of all the property here involved was approximately $24,000 in 1928 when it sold to Lillie Jones, as indicated, for $1,354.37.

The only liens against the property at that time were the amount due the Land Bank and approximately $2,220 unpaid balance on the mortgage to Mosaic Templars.

On or before the date (December 22, 1928) on which Lillie Jones recorded her commissioner's deed, supra, at Jones' direction, she borrowed $3,750 from the Commonwealth Building & Loan Association, giving as security a mortgage on Lot 21, supra. It is significant that the

commissioner's deed to Lillie Jones and the mortgage to the Building & Loan Association were filed on the same day.

While she paid only $1,354.37 for all the land involved under the foreclosure sale, this record does not disclose what she did with the balance of $3,750, supra, amounting to a little less than $2,400.

The record reflects that Williams had given three mortgages to the Bank of England, one in 1924 for $2,330 and one March 5, 1925, for $2,300, both of which were satisfied of record December 21, 1928. The third mortgage for $2,300 dated December 1, 1925, is the one foreclosed here. Whether the second and third mortgages were renewals of the first, the record does not disclose.

The Building & Loan Association foreclosed its mortgage and acquired title to Lot 21.

Appellee, Williams, testified, in effect, that Jones had been his attorney and advisor for some time prior to the Bank of England's foreclosure suit, supra, represented him at this foreclosure and continued as his attorney until his death. He further testified that under the terms of an agreement which he had with Jones, that he, Jones, was to purchase all the land at the foreclosure sale in Lillie Jones' name, arrange to borrow $1,354.37 on the land, and hold title for Williams until the Federal Land Bank mortgage was fully paid and that they would then have a settlement.

He further testified that he knew nothing of the $3,750 mortgage, supra, until the filing of the present suit, that he, Williams, at all times mentioned in this case has been in possession and control of the farm land and of the lots involved, has never paid any rent, has paid all taxes, and all amounts due on existing mortgages. He further testified that some of the town lots forfeited for certain improvement district taxes and that Jones procured two quitclaim deeds from the district, one was made to Williams and his wife, and the other to his son, and that while Scipio and Lillie lived, neither has questioned appellee's ownership.

Mr. Meurer, the Land Bank representative, further testified that on more than one occasion, Scipio and Lillie told him, "he (Scipio) said that John Williams owed him or owed his wife some money, that when John Williams had paid this money she would re-convey to John Williams."

There appears to be no evidence of any debt from appellee to Lillie Jones.

Following Lillie Jones' death, August 6, 1945, her administrator filed on separate dates, an original and a supplemental inventory of her estate, and in neither of them was there listed any of the property involved here nor any debt from Williams.

After reviewing the facts presented, we have concluded that the evidence (record and oral) was sufficient, and of that clear and convincing character, to establish an implied or constructive trust on behalf of appellee, Williams, that Lillie Jones, during her life, held the legal title for Williams' benefit, and after her death, her heirs so held it for Williams' benefit, with the trust imposed upon it.

It is well settled that an agreement creating an implied or resulting trust may be shown by oral testimony. *Bray v. Timms,* 162 Ark. 247, 258 S. W. 338, and *Beloate v. Taylor,* 202 Ark. 229, 150 S. W. 2d 730.

This court held in *Moore, et al. v. Maxwell, et al,* 18 Ark. 469, that where the decedent held title in trust, upon his death, his heirs held it, charged with the same trust.

Upon the death of the trustee, the trustee's heirs are vested with the estate subject to the trust. *Badgett and Wife v. Keating and Wife,* 31 Ark. 400.

"Generally speaking, a trustee who * * * repudiates the trust, claiming title as absolute owner, forfeits his right to compensation." *McHenry v. McHenry,* 209 Ark. 977, 193 S.W. 2d 321.

In this case, we find no evidence of any fraud, attempted or practiced by Jones on his client, Williams.

We think the evidence clearly shows that Jones intended to carry out the agreement which the evidence establishes he had with Williams, and that death prevented his doing so.

In regard to appellants' claim of title alleged, supra, as resulting from the court order of 1938 in the case of Morris v. Williams, in which Jones was Williams' attorney, and directing a judicial sale to enforce the mortgage lien of Morris in which order it was recited, in effect, that such sale should not foreclose or effect any interest of Lillie Jones in said property, little need be said. This order did not attempt to decide what interest Lillie Jones had in the property nor was there any issue in that case between Lillie Jones and Williams.

As to the court order of May 23, 1941, which was made in the foreclosure suit of the Federal Land Bank against Williams, the record reflects that this order was based on the report of Robert Meurer, receiver. The order did not adjudicate the beneficial ownership of Williams, but recited that Lillie Jones is "the owner and title holder of record" of the property. As has been indicated, appellee does not contend that Lillie Jones did not hold the record title. There was no issue in that proceeding between Lillie Jones and appellee, Williams, as to title, the only matter presented being Meurer's report.

"That which has not been tried cannot be said to have been adjudicated * * *. That which is not within the scope of the issues presented cannot be concluded by the judgment." *Harris v. Whitworth, Administrator,* 213 Ark. 480, 211 S.W. 2d 101.

Finding no error, the decree is affirmed.

FERGUSON *v.* COOK, COMMISSIONER OF REVENUES.

4-8894 220 S. W. 2d 808

Opinion delivered May 30, 1949.

Gordon & Gordon, for appellant.

O. T. Ward, for appellee.

FRANK G. SMITH, J. The Commissioner of Revenues for the State, after a hearing had been accorded appellant, ordered that delinquent sales tax be collected from appellant with the statutory penalty of 10% and interest, all totaling $887.75. This order was affirmed on appeal to the Pulaski Chancery Court, from which decree is this appeal.

The cause was heard on stipulations as to what appellant's testimony and that of his bookkeeper would be, and that of the Supervisor of Gross Receipts Tax Division of the State Revenue Department would be if called as witnesses, and upon a stipulation of facts derived from this testimony. The stipulation as to facts reads as follows:

"It is stipulated and agreed that R. P. Ferguson, owner and operator of Ferguson Monument Works, Morrilton, Arkansas, manufactures and sells monuments for erection at graves, and that in keeping his accounts with

each individual customer he enters the total sales price of a monument, including all labor services as part of the sale price thereof and enters the same on his leger, and that the only other entry or entries on such account is the entry or entries of payments for the amount; that each account is handled in the same way and that at the close of the month the total amount of sales as above indicated is entered and one-half of which is specified as labor, and that in the computation of his sales tax on such sales he computes the 2 per cent tax on one-half of the total amount thereof, that in making his monthly returns to the commissioner of Revenues he does not disclose the total amount of his sales for the month, but that instead he reports only the one-half of the total sales for the month; that he makes no explanation in his return about the deduction of one-half or any portion for labor or services. It is further stipulated and agreed that for the purpose of determining the facts in this case that one-half of the total contract price of the monument in place is represented as labor and that the other half is the value of monument as a material or property value."

This stipulation involves primarily the question whether when a monument dealer sells and erects a monument at a grave for a specified sum of money, the sales tax shall be assessed for the full price paid for the monument and incidentally whether a penalty should be imposed for the nonpayment of this tax in the time and manner provided by law. It appears from the stipulation that appellant made reports showing not all, but only one-half of the price he collected on each monument erected, his contention being that one-half of the price charged for the monument was deductible for the service and labor of the erection of the monument, which it was stipulated equaled one-half of the cost of the monument.

The answer to the question presented for decision depends upon the interpretation of Act 386 of the Acts of 1941, p. 1056, the title of which is An Act to provide for raising revenues for certain purposes "by Prescribing and Levying Specific Taxes Upon Gross Receipts Derived From Sales."

There has been much legislation imposing sales taxes with an innumerable number of cases construing this legislation, much of which is reviewed in the annotation to the case of Acorn Iron Works v. State Board of Tax Administration, 139 A.L.R., 368 et seq. This annotation supplements annotations on the subject appearing in 98 A.L.R. 387, 111 A.L.R. 943 and 115 A.L.R. 491.

The annotations recognize the great differences in the legislation imposing this tax, and point out that almost invariably they contain their own definition of sales at retail and of clauses which have the effect of defining them, and that the effect of such definitions is to render immaterial the question whether the transaction on which the tax is levied meets the technical requirements of a sale at common law, and that the definition employed will prevail over definitions that may be found in dictionaries.

Only one case is cited which involved the question whether the cost of erecting a monument is subject to the sales tax, where the price charged for the monument included its erection, which is the case of S. Goldstein Monument Wks. v. Graves, 254 App. Div. 798, 4 N.Y.S. 2d, 241, cited in the annotators note in 139 A.L.R., 384, which held that the tax should be computed upon the price which included labor and service in addition to materials.

Appellant insists that the New York case is not authority in this on account of the differences in the statutes of the two states. A reading of the New York statutes shows, however, that the statutes of that state are very similar to our own in the respects here considered.

The New York statute, Chapter 281, Laws of N.Y. 1933, § 390, Article 17, p. 765 defines the terms used in the sales tax law of that state. And paragraph (b) thereof reads in part as follows: "The term 'receipts' means the total amount of the sale price of tangible personal property sold at retail in this state, valued in money, whether received in money or otherwise, including all receipts, cash, credits and property of any kind or nature, and also any amount for which credit is allowed by the seller to the purchaser, without any deduction therefrom on account of the cost of the property sold,

the cost of materials used, labor or service cost, interest or discount paid, or any other expense whatsoever, from the sale of tangible personal property at retail in this state,'' with certain exceptions not relevant here.

Paragraph (b) of § 2 of our Act 386 of 1941 defines the terms there employed and sub-paragraph (c) of that section provides: ''The term 'sale' shall not include the furnishing or rendering of service or services, except as is herein otherwise provided.'' But immediately following in sub-paragraph (d) appears this definition: ''Gross Receipts-Gross Proceeds: The term 'gross receipts' or 'gross proceeds' means the total amount of consideration for the sale of tangible personal property and such services as are herein specifically provided for, whether the consideration is in money or otherwise, without any deduction therefrom on account of the cost of the property sold, labor service performed, interest paid, losses or any expenses whatsoever.'' The principal difference between the New York statute and our own is that the New York statute includes, while our statute omits the word ''discount''.

This language appears to mean, and we so construe it, that where one sells an article in the preparation of which for sale he has expended labor, which adds to its value and was necessary to make it salable, he must pay the sales tax on the price received, without deduction for the value of the labor performed.

It is insisted that although the tax should be charged no penalty for its delayed payment should be imposed, and the case of State v. New York Life Ins. Co. 198 Ark. 820, 131 S.W. 2d, 639, is cited to support that contention. That case involved the failure of the Life Ins. Co. to report its annuity premiums, while the company had made report of all premiums upon which a report was required, and the testimony showed that over a period of many years the administrative officers of the state were of the opinion that annuity premiums were non-taxable, and the opinion recites that certain members of the court were even then of that opinion, as evidenced by a concurring opinion filed in that case.

The stipulation as to what appellant's testimony would be if called as a witness was that he had never reported the full price received upon the sale of a monument, but had always deducted one-half thereof to cover labor and services rendered in its erection, and that upon inspection of his books, which was usually made annually, the fact stated was so disclosed.

The Supervisor of the Gross Receipts Tax Division would have testified, according to the stipulation as to his testimony, that no reports had ever been made to his department showing that a tax was collected on only fifty percent of the sales price, and that the first knowledge of that fact came when an audit of appellant's books was made. The stipulation above copied is corroborative of this testimony and we think the court was warranted in finding that a tax was due which had not been reported although appellant did not collect the tax on the total amount of the sales.

In the New York Life Ins. Co. case, supra, report was made of all the taxes, which was required, while here there was a report of only one-half that amount. Superior Bath House v. McCarroll, 200 Ark. 233, 139 S.W. 2d, 378. The penalty was therefore properly imposed and the decree imposing it is therefore affirmed.

BELCHER *v.* WHEAT.

4-8854 220 S. W. 2d 811

Opinion delivered May 30, 1949.

J. W. House, Jr., John W. Moncrief and *Virgil R. Moncrief*, for appellant.

June P. Wooten and *W. W. McCrary, Jr.*, for appellee.

FRANK G. SMITH, J. This appeal involves the title to a tract of land, the value of which appears to be derived from its adaptability for duck shooting. Taxes thereon, both general and improvement district taxes, appear to have been paid at irregular intervals, with consequent sales for delinquency from which redemptions were in some instances effected.

Appellee filed suit to quiet his claim of title to the land. The title sought to be quieted, was based on a sale made Nov. 15, 1923, which was duly confirmed under a decree ordering the sale in the suit of the Bayou Meto Drainage District foreclosing its liens for the delinquent taxes due the District for the year 1922, and the deed to appellee from the Drainage District dated January 16, 1948.

Appellant claimed title under a deed to him from the State Land Commissioner, dated Nov. 18, 1946, based upon a forfeiture to the State for the unpaid taxes of 1933. He alleged also that he had applied to the Drainage District to purchase the land, and was told that he might do so when he had acquired the State's title, but after acquiring that title he was advised, when he applied to the Drainage District for the deed, that the land had been sold by the District to appellee. Appellant insists also that his deed from the State, dated Nov. 18, 1946, was color of title under which he made certain improvements, and he prayed judgment for the enhanced value of the land resulting therefrom.

The Drainage District is not a party to this suit, and it was not shown that appellant had any contract with

it of which appellee was apprised, which estopped the District from conveying to appellee. Indeed it was not shown that appellant had an enforceable contract to buy the land. He testified that the attorney for the board of directors of the Drainage District told him that the District would convey the land to him when he had acquired a deed from the State. It was not shown that the board of directors were aware of this promise or had made any contract with appellant, who might have purchased from the District upon a tender of the price asked for the land and thereby acquired the right to redeem from the State, but no tender of any kind was made the District. No contract was made under which appellant acquired the right to purchase from the Drainage District.

The court quieted appellee's title against appellant's claim of title and disallowed appellant's claim for improvements alleged to have been made. Upon that issue the case is similar to and is controlled by the opinion in the case of Baiers v. Cammack, 207 Ark. 827, 182 S. W. 2d, 938.

In the Cammack case, supra, the State became the purchaser of land sold for taxes due thereon and executed a deed to Baiers which was held void for the reason that at the time of the tax sale the title was in the Improvement District claiming title in its governmental capacity. Baiers claimed the right to recover the value of certain improvements from Cammack who had acquired the Improvement District's title. The claim for improvements was denied upon the ground that they were made while the title was in the Improvement District and before Cammack acquired the Improvement District's title. So here, as in the Cammack case, it was not shown that the improvements were made subsequent to the sale of the land by the Improvement District, but were made prior to that time. Upon the authority of the Cammack case, claim for improvements was properly disallowed.

The decree quieting title and disallowing claim for improvements is therefore affirmed.

4-8867 220 S. W. 2d 812

Opinion delivered May 30, 1949.

[redacted]

Hebert & Dobbs, for appellant.

McMath, Whittington, Leatherman and *Schoenfeld,* for appellee.

GRIFFIN SMITH, Chief Justice. In September 1946 Louis Longinotti, Sr., and G. H. Britt, were partners conducting Citizens Club Booky—a place where gambling contracts were made. Longinotti's son, Louis Junior, was an employe. T. L. Rhodes, 53 years of age, operated a grocery store and sub-bakery. He patronized the Club on September 25th and engaged in a bet argument with the elder Longinotti. The younger Longinotti, working within a few feet from where the verbal controversy took place, projected himself into the dispute by

bodily assaulting Rhodes, who sustained severe facial injuries. In a proceeding for damages and punitive assessment the jury returned a verdict for $4,750 without designating what part of the award was to compensate actual injury and what was apportionable to the exemplary demands.

In this appeal the partners contend (1) that a plea of *res judicata* should have been sustained; (2) Longinotti, Jr., in assaulting Rhodes, acted beyond the scope of his employment; (3) the Court erred in giving plaintiff's Instruction No. 3, which allowed compensation for future suffering on account of the injuries; (4) the verdict is excessive.

The first assignment is predicated upon an incomplete trial October 27, 1947, and the Court's action in granting a nonsuit after having stated that the cause would be dismissed as to the elder Longinotti and Britt for want of evidence. A complete transcript of discussions in chambers discloses that it was the Court's purpose to grant the nonsuit, even though the Judge had formerly expressed a purpose to dismiss. This was not an abuse of discretion, and the point must be decided against appellants.

The evidence was sufficient to sustain appellee's contention that young Longinotti was employed by his father and Britt. In fact, each admitted the relationship. The only question in this connection is scope of the employe's duties. Generally speaking, he was a clerk, sometimes working at a desk adjusting accounts, but at times mixing with patrons. Just before the assault on appellee, young Longinotti was "behind the counter", a distance of several feet from where the elder Longinotti and Rhodes were engaged in a dispute. As one witness expressed it, young Longinotti was "at the low counter behind the payoff on horses, where he worked all the time", and the controversy between the senior Longinotti and Rhodes was based on Rhode's contention that he (Rhodes) had bet on a designated entry.

Although testimony regarding the physical encounter is in sharp dispute, there was substantial basis for a

jury finding that Rhodes, when informed that his horse had not won, told the elder Longinotti he was a 'damned rascal'. The accused man walked to a position near his son, who to reach Rhodes vaulted inpediments and struck right and left. He was a trained boxer, an instructor in an athletic organization, and had no difficulty in severely punishing Rhodes, who retreated across the room and leaned or fell against a so-called catwalk. From a standpoint of substantiality, the evidence was sufficient to show an unnecessary assault viciously pursued, and executed in the interest of the assailant's father in circumstances from which the jury could conclude that the action was concurred in.

The elder Longinotti testified that instructions had been given to call the police in case arguments with patrons occurred, but facts were shown from which the jury had a right to believe that young Longinotti, an expert fighter, was at least a "bouncer's" relay, and with approval of the two partners was expected to handle emergency disputes.

Instruction No. 3 told the jury that if it should find for the plaintiff there was a duty to "consider" whether the injured man was likely to suffer in the future from effects of the wounds. It is insisted there was no evidence showing a probability of future pain or impairment, hence the instruction was abstract.

There was testimony showing impairment that had continued from the attack until trial, and in Dr. Reed's opinion future suffering on a gradually declining scale could be expected. This testimony, considered in connection with appellee's description of his injuries and the after-effects, justified the instruction.

While the jury's award of $4,750 appears to be rather liberal, there were aggravating circumstances that place the appellants in an indefensible position. In the first place, treating the jury's verdict as a finding that the assault was unprovoked—a conclusion amply supported —the force employed was wholly unwarranted. Dr. Reed described head injuries as ". . . a deep stellar laceration below the left eye, [involving] a contusion with

a sub-conjunctival hemorrhage". In the layman's language, "flesh of the left cheek was torn from the center, and then torn out from that center to lines extending in many directions, exposing the antrum—one of the sinuses", and leaving scars. A large number of stitches [some said twelve] were required to close the wound, which had bled profusely. Bandages were not removed for seventeen days, and the left eye "watered" until January. Rhodes also reported to Dr. Reed (but not until three weeks after the encounter) that his back had been bruised, resulting in severe pains in extremities. Anti-pain medicines were prescribed.

Appellee undertook to emphasize his damages by showing that the nature of his injuries required constant attention by his wife, with the result that the grocery store and sub-bakery were closed, and later sold at a loss. The Court properly excluded this testimony in the form it was offered.

Appellants argue that the size of the verdict shows conclusively that something was allowed as exemplary damages. Our cases hold that, as a predicate for exemplary awards, actual damages must be found. *Kroger Grocery & Baking Co.* v. *Reeves,* 210 Ark. 178, 194 S. W. 2d 876. What the rule rejects is punishment where actual injury has not been shown. In the case at bar serious trauma is undisputed and was sufficient for substantial recovery. Appellants, through a requested verdict apportionment, could have separated the elements, but they did not ask that this be done.

Affirmed.

ARMITAGE *v.* MORRIS, ADMINISTRATOR.

4-8836 221 S. W. 2d 9

Opinion delivered May 9, 1949.

Rehearing denied June 27, 1949.

Gordon Armitage, for appellant.

Owen C. Pearce and *Culbert L. Pearce,* for appellee.

GRIFFIN SMITH, Chief Justice. A direct appeal by Armitage is from a judgment that as attorney he retained as a fee $379.28 more than the charge should have been for services rendered Louis Lexton Morris in two transactions involving an estate. Armitage has also appealed from dismissal of his cross-complaint against Morris, Owen C. Pearce, and Culbert L. Pearce, alleging damages for defamation of character. Morris has cross-appealed from the judgment allowing Armitage compensation in any sum, and from the Court's refusal to hold that in remitting $1,896.81 to Cox & Company without his client's authority, Armitage converted the fund.

Walter B. Morris died in California in November 1943. His nearest of kin were a brother and a sister:

Ann Dye and Louis Lexton Morris. For many years Louis and Ann had resided in White County, near Searcy, Arkansas, and neither knew where Walter was; nor were they informed of his death. Ann died in January 1944, unmarried and without issue. Louis was appointed Administrator January 26, 1944. His only report, approved February 23, 1945, disclosed net assets of $3,898, which went to Louis by descent and distribution. The Court's order of approval discharged the administrator and the United States Fidelity and Guaranty Company "of all liability on the bond executed by said Administrator."

In May 1946 W. C. Cox & Company, a corporation domiciled in Chicago, wrote Louis that his brother Walter had died "in a West Coast city," leaving a valuable estate. The suggestion was that for a share in the net proceeds the corporation would bring about a settlement of the estate, otherwise the assets would escheat.

Morris, after conferring with Armitage, contracted with Cox & Company on a contingent basis, the corporation to receive forty percent of the net estate. Armitage says that when this agreement was made a Cox representative was present, and prepared a separate contract for Morris to sign under which the attorney would receive five percent, payable by Morris. He protested that the amount was insufficient, but left the matter for later determination.

In August the Superior Court for Los Angeles County, California, required information regarding Ann Dye Morris, whose estate was shown to be in process of administration. As a result of further discussions with Morris, Armitage procured from the Probate Clerk at Searcy a certificate that Lewis Lexton Morris as Administrator had not been discharged. In February 1947 the Public Administrator for Los Angeles County sent the Cox Company two checks, each for $4,742.03: one payable to Morris personally, the other to him as Administrator. They were dated February 13.

It is contended by Armitage that when complications arose regarding what would have been the dis-

tributive share of Ann if she had lived, Morris agreed to pay him ten percent of the net amount of Walter's estate, and also told him to go ahead and handle the collections as his best judgment suggested.

When Cox received the California checks, the one payable to Morris was indorsed under power of attorney, and the Company's check for sixty percent was sent to Armitage—$2,845.22. Cox sent the other California check to Armitage without indorsement.

Armitage indorsed, "L. L. Morris, Gordon Armitage, Attorney," and deposited to his own credit in a Searcy bank the Cox check for $2,845.22, and on March 8, 1947, caused Morris to execute a form reading: "Received of Gordon Armitage $4,742.04—Security Bank deposit 3-6-47, $2,371.02, and cash in the sum of $2,371.02, the receipt of which is hereby acknowledged."

Actually, Armitage had deposited to the credit of Morris' account $2,371.02, and the difference of $474.20 was subsequently claimed by him as ten percent on the California payment of $4,742.02.

There remained the second California check. On March 3d—five days before the receipt from Morris was dated—Armitage sent to Cox his personal check for $1,896.81, representing forty percent of the Ann Morris transaction. In procuring clearance of the California check, Armitage indorsed it, "Lewis Lexton Morris, as Administrator of the Estate of Ann Dye Morris, Deceased, heir-at-law. By Lewis Lexton (X) [his mark] Morris. Witness to mark: Gordon Armitage [and] Melba J. Haynie, Searcy, Ark. Gordon Armitage, Attorney."

With these endorsements Security Bank accepted the check February 27.[1] On March 26th Armitage

[1] A letter from Cox dated February 21 mentioned that the check was being sent to Armitage. A post script is: ". . . We have decided, upon advice of our bankers, not to indorse the Administrator's distributive share under the authority given in the power of attorney, but, on the other hand, to send it direct to the Administrator for his personal indorsement. We therefore hand you [the California check] . . . in the face amount of $4,742.03. . . . It is very likely that a certified copy of Letters of Administration will have to be produced when the check is presented for payment."

bought bonds for Morris' account. He testified that during the intervening twenty days "I had kept the $2,371.02 in my lock box."

Late in May, 1947, in a communication prepared by the law firm of Owen C. and Culbert L. Pearce, Morris complained to Armitage that of the sixty percent released by Cox [amounting to $5,790.44] he had received but $2,371.02. He mentioned that the attorney was entitled to a fee of $237.10; and demand was made for the remainder.

Armitage replied (May 31) in a letter addressed to Cul. L. Pearce. One of his statements was: "I have in my files a receipt from Lewis of all sums due him.[2] I also have bonds that belong to him that no one [else] can cash, which were purchased for him on that basis." Armitage expressed a willingness to deliver the Securities to some responsible person, "[for] Lewis, in my opinion, has in the last year reached the point where he is not capable of looking after his best interests. . . ." A Court order directing Armitage to produce certain records found that on July 11 "the defendant deposited with the Clerk of the Probate Court U. S. Series E. bonds aggregating $3,150 face value, which he says he bought with funds belonging to plaintiff as Administrator."

[2] Throughout the record "Louis" and "Lewis" appear, and the spelling in this opinion corresponds with usage at a particular time or place.

Armitage testified that when he deposited $2,371.02 to Morris' credit March 8th "and obtained a like amount in cash," the receipt formerly referred to was prepared "for the full amount to be paid over." Armitage says that after Morris signed the receipt he told him "we" should buy bonds with the cash, but Morris refused to do so.

It is contended by Armitage that the Ann Morris estate was in process of administration in 1947, irrespective of the fact that in February 1945 a Court order had discharged the Administrator from bond liability, and had relieved U. S. F. & G. as surety. But assuming administration had not been closed, Probate

Court, as distinguished from Armitage personally or in his capacity as attorney, was the appropriate depository for the California check, or its proceeds.

It requires no citation of authority to sustain the proposition that an attorney is inconsistent when upon the one hand he treats his Administrator-client as competent to contract for a fee, competent to authorize payment from estate funds without a Court order, competent to make personal contracts relating to money not bound up with a sister's estate, but, upon the other hand, wholly incompetent to handle his own affairs, or to function in an official capacity judicially conferred.

The trial Court seemingly believed that unnecessary delays in making settlement, unauthorized indorsements, and a want of diligence in discharging professional duties, created a situation demanding legal action by Morris, and relieving him of further financial obligation to Armitage, irrespective of what the original contract may have been. We have the same views.

In his cross-complaint Armitage alleged that he had been charged with forgery, and otherwise libeled. The Court did not err in declining to award damages. Indorsement of Morris' name by mark was a subterfuge. Armitage insisted that as attorney he had general power to sign for his client. This is not the law. Mere existence of the relationship of attorney and client does not imply that the attorney has authority to sign a client's name to checks, drafts, or other negotiable paper. In the case at bar there was no need for the action taken. It was admitted that Morris could write. He filed a signature specimen, written in the Court's presence. The contract, and the power sent to Cox at the direction of Armitage, were signed by Morris. Melba Jo Haynie testified that Armitage asked her, as his secretary, to witness the mark; and, she said, "Morris wasn't in the office I was in." When asked why he took the receipt from Morris on March 8, Armitage replied, "I knew he wasn't competent to sign it then, [but] I took it just as a matter of record." In response to the question, "If you didn't think the receipt was any good, why did

you take it?'' Armitage replied, ''I don't know that I should answer that. . . .'' Armitage did not contend that Morris authorized him to sign the check, by mark or otherwise.

In the light of this record the trial Court believed that, although a contract to pay ten percent was shown, services under it fell short of mutual intentions. Because of the breach Morris was entitled to the judgment rendered. The two California checks were, in a sense, treated as separate transactions, and since Morris was not injured by the diversion complained of when Cox was paid for the services rendered up to that time, the Chancellor's action on that part of the complaint will be affirmed.

In the cross-complaint Armitage alleged injuries as for libel. The matter to which he took exceptions, whether justified or not, was in a sense invited. It was a consequence of his refusal to coöperate. There was no evidence that the cross-complainant's reputation was injured, and at most no more than nominal damages could be awarded. The Court was correct, however, in finding for the cross-defendants on this issue, and the decree in its entirety will be affirmed. It is so ordered.

BEARD, COLLECTOR *v.* VINSONHALER.

4-8881 221 S. W. 2d 3

Opinion delivered May 23, 1949.

Rehearing denied June 27, 1949.

T. J. Gentry, for appellant.

Bailey & Warren and *Bruce T. Bullion,* for appellees.

George Rose Smith, J. This case involves the validity of occupation taxes levied by Ordinance No. 7573 of the City of Little Rock. The appellees, a partnership owning radio station KGHI and a corporation owning station KARK, brought suit to enjoin the City Collector from enforcing the ordinance, upon the theory that the taxes are an unconstitutional burden on interstate commerce. The chancellor sustained this contention. A second contention, that the ordinance infringes the guaranty of free speech, has been abandoned.

The ordinance levies an annual occupation tax of $250 upon persons who either (*a*) carry on the business of producing or generating electro-magnetic waves for the purpose of broadcasting by radio transmission or (*b*) engage in the business of intrastate radio broadcasting. The law recites that it shall not apply to that portion of the business that may be in interstate or foreign commerce, or to business done for the government of the United States. There is levied also an annual tax of $50 upon the business of soliciting radio advertising within the city, with the same exemption of interstate, foreign and Government business.

The appellees' basic argument is that all radio broadcasting is essentially interstate commerce. The proof shows that radio waves continue to travel indefinitely, that even a comparatively weak transmitter sends its signals far beyond the borders of its own State—though with a natural diminution in strength as the impulses are diffused over a widening circle. Station KARK has been heard in every State and in countries as distant as Australia and New Zealand. Of course such facts as these underlie the various decisions holding that radio broadcasting is at least partly interstate commerce and that in its interstate aspects it may not be burdened by State privilege taxes. See, for example, *Fisher's Blend Station, Inc.*, v. *State Tax Com'n*, 297 U. S. 650, 56 S. Ct. 608, 80 L. Ed. 956, in which the court struck down a privilege tax upon gross receipts from interstate broadcasting.

The question here, however, is whether radio broadcasting also involves intrastate activity which may be subjected to local taxation. It is shown that the appellees broadcast not only national network programs, originating elsewhere and relayed to Little Rock by telephone wire, but also local programs arising in the appellees' studios. About a fourth of the appellees' income is derived from local advertisers; the rest comes from the sponsors of programs originating outside the State.

We think the appellees' business is intrastate as well as interstate. Suppose, for instance, that a candidate for mayor broadcasts an address to the city's electors or a small bakery advertises a sale of its bread. Not only do such programs originate in Little Rock, but both their intended appeal and actual effect are wholly local. Only citizens of Little Rock can vote in her elections; only neighborhood customers will act on the invitation to buy a loaf of bread. It is immaterial equally to the appellees and to their advertisers that a handful of nonresidents may listen momentarily to the broadcast before turning to a program of greater interest. Such transient eavesdropping is merely an adventitious consequence of the uncontrollable carrying power of radio waves. This

ordinance taxes only the local transaction, expressly exempting these fortuitous interstate aspects.

In this respect the opinion in *Postal Tel. Cable Co.* v. *Charleston,* 153 U. S. 692, 14 S. Ct. 1094, 38 L. Ed. 871, is enlightening. The city levied an annual privilege tax of $500 upon telegraph companies "for business done exclusively within the city of Charleston, and not including any business done to or from points without the State." The company argued that the tax was really upon its entire business, but the court answered this contention by pointing to the language of the ordinance. It was also urged that great injury might result to the company if various cities were allowed to tax it, but the court replied: "But this is a hardship, if such exists, that it is not within our province to redress. If business done wholly within a State is within the taxing power of the State, the courts of the United States cannot review or correct the action of the State in the exercise of that power."

In the latter respect this case is even stronger, for the possibility of multiple taxes does not exist. Little Rock alone is in a position to exact a license fee for the intrastate business done by these radio stations. This consideration was stressed in *Western Live Stock* v. *Bureau of Revenue,* 303 U. S. 250, 58 S. Ct. 546, 82 L. Ed. 823, 115 A. L. R. 944, wherein the court sustained a tax upon gross receipts from a trade journal that carried out-of-state advertising and went to many nonresident subscribers. From the opinion: "But there is an added reason why we think the tax is not subject to the objection which has been leveled at taxes laid upon gross receipts derived from interstate communication or transportation of goods. So far as the value contributed to appellants' New Mexico business by circulation of the magazine interstate is taxed, it cannot again be taxed elsewhere any more than the value of railroad property taxed locally. The tax is not one which in form or substance can be repeated by other states in such manner as to lay an added burden on the interstate distribution of the magazine."

Nevertheless, appellees insist that the interstate and intrastate elements of broadcasting are inseparable, so that a tax upon one is inevitably a tax upon the other. As a physical matter it is true that the electric waves cannot be divided into separate classes, but that fact is not conclusive. In *Pacific Tel. & Tel. Co.* v. *Tax Com'n of Washington*, 297 U. S. 403, 56 S. Ct. 522, 80 L. Ed. 760, 105 A. L. R. 1, the court summarized its earlier cases by saying: "No decision of this Court lends support to the proposition that an occupation tax upon local business, otherwise valid, must be held void merely because the local and interstate branches are for some reason inseparable."

Furthermore, it is only the emanations of the radio waves that are inseparable. Those are not what this ordinance endeavors to tax; instead, the tax is laid upon a course of conduct that constitutes engaging in intrastate business. A substantial part of the appellees' programs originate locally and are of purely local interest. To that extent the appellees are engaged in a local enterprise readily separable from their interstate activity. Should they confine their broadcasts to programs brought in from other states there might be force to their suggestion that interstate commerce is being taxed. But as long as they conduct an essentially intrastate business as well, we see no reason why they should not bear their share of the cost of municipal advantages admittedly received. It is shown that daily newspapers pay an annual tax of $1,000, although some of their papers go beyond the State boundaries. The telephone company's tax is $45,000, though its business is interstate as well as intrastate. By comparison the appellees' tax is moderate in amount. It is not even suggested that the sum exceeds the profits derived from local business, so that interstate receipts are to some extent affected. Whether such a showing would invalidate the tax is at least doubtful, in view of the language in *Postal Tel.-Cable Co.* v. *Richmond*, 249 U. S. 252, 39 S. Ct. 265, 63 L. Ed. 590, and *Pacific Tel. & Tel. Co.* v. *Tax Com'n, supra.*

As an alternative the ordinance taxes the generation of electro-magnetic waves within the city. To the extent that this is a step in the process of broadcasting the same considerations that we have discussed are applicable. Moreover, the production of these waves is even more local in its nature. It is shown that broadcasting involves a number of distinct processes. Initially, the impact of sound waves upon magnets within the microphone so affects an alternating electric current as to create electro-magnetic waves. Those who are engaged in the production of such waves are subjected to the tax. The current is next amplified and sent by wire from the studio to the transmitting station. According to one of appellees' witnesses, at that point "it is not radio." At the transmission station the electric impulses are again amplified, modulated, and sent forth into the atmosphere, the process then becoming radio. When the impulses are picked up by a receiving set the process is reversed and they are changed back to sound waves.

The tax may be likened to that upheld in *Utah Power & Light Co.* v. *Pfost,* 286 U. S. 165, 52 S. Ct. 548, 76 L. Ed. 1038. There the excise was levied in Idaho upon the generation of electricity that was immediately transmitted to Utah. No energy was kept in storage, so that when a Utah consumer turned a switch to use electricity the effect was to set in operation the generators in Idaho, which at once transformed water power into the required electrical energy. Even though generation and transmission were elements of a continuous process, the court held that they were distinct operations. The tax upon the generation of the current was accordingly upheld, in spite of its instantaneous transmission into interstate commerce.

In the case of *Fisher's Blend Station, Inc.,* v. *State Tax Com'n, supra,* strongly urged by the appellees, the court was careful not to say that a tax upon the generation of radio impulses would be invalid. This point was reserved by the following language in the opinion: "Whether the state could tax the generation of such energy, or other local activity of appellant, as distinguished from the gross income derived from its busi-

ness, it is unnecessary to decide." In this case the city is venturing only into the area kept open by that decision.

What we have said disposes also of the attack upon the tax levied upon the business of soliciting radio advertising. This activity is even more distantly removed from the interstate aspects of broadcasting, and thus its liability to local taxation is even more clearly apparent.

Reversed and dismissed.

HOLT, J., dissenting. I respectfully dissent.

The City Ordinance involved here contains nine sections and provides, in effect: (1) The business of (a) generating electro-magnetic waves for radio broadcasting purposes and/or (b) the business of intrastate radio broadcasting in Little Rock is a privilege and every person, etc., engaged therein shall pay to the City Collector an annual license fee of $250 beginning on or before April 30, 1948;

(2) That the business of soliciting intrastate radio advertising in Little Rock is a privilege and every person, etc., engaged therein shall pay to the City Collector an annual license fee of $50 beginning on or before April 30, 1948;

(3) Specifically declares the Council's intent not to levy the tax upon interstate radio broadcasting and/or advertising solicitation; and

(4) Provides a penalty of from $15 to $100 per day for each day's failure to pay said tax.

The trial court found that this Ordinance constituted a burden on interstate commerce and was therefore unconstitutional.

Appellees clearly and concisely state the questions presented in this language: "1. Is the business of producing electro-magnetic waves for broadcasting purposes such a separable incident of radio broadcasting as to permit a municipal government to levy a privilege tax thereon, or is such a tax in violation of the Commerce Clause of the United States Constitution?

"2. May a municipal government levy a privilege tax upon those persons, etc., who solicit radio advertising within the corporate limits of the city, or is the solicitation of radio advertising 'soliciting goods intended for interstate commerce' and hence within the purview of the Commerce Clause of the United States Constitution?"

The two broadcasting stations involved here—(as are all broadcasting stations throughout the Nation)—are licensed, controlled and regulated by the Federal Communications Commission.

Radio broadcasting, by its very nature, transcends State lines and is national in its scope. No method has as yet been devised by which the sound waves, which are generated and immediately transmitted through the ether, may be localized or stopped at State boundaries. It is impossible to separate intrastate from interstate business since all broadcasting is interstate in scope. In this respect, radio broadcasting is entirely different from such businesses as that of telephone, telegraph and electric power companies, for obviously, you can separate, for tax purposes, gross receipts realized by telephone, telegraph or power companies done beyond the State's borders, or interstate from their intrastate business. In other words, these three latter companies could engage solely in intrastate business if they so desired, without even crossing State boundaries, but not so with radio broadcasting.

The generation of electro-magnetic waves and the transmission of those waves is, according to the evidence, practically a simultaneous operation, and neither can be singled out as a separate and distinct part and subjected to local taxation.

In the case of *Station WBT* v. *Poulnot,* (1931), 46 F. 2d 671, wherein the State of South Carolina enacted a law imposing an annual license tax upon the privilege of owning or operating a radio receiving set, the court in holding the law unconstitutional as a burden upon interstate commerce, said: "The only question remaining is whether the state has the right to lay a tax upon these

instruments of interstate commerce. Under the numerous decisions of the Supreme Court there can be only one answer. Those decisions hold that Congress has the power to regulate interstate commerce; that that power is necessarily exclusive whenever the subjects are national in their character or admit only of one uniform system or plan of regulation; and that where the power of Congress to regulate is exclusive, the failure to regulate indicates the will that it shall be left free from any restrictions or impositions; and any regulation of the subject by a state, except in matters of local concern, is repugnant to such freedom; that no state can compel a party, individual, or corporation to pay for the privilege of engaging in interstate commerce, and that a state has no power to lay any burden in any form, by taxation or otherwise, upon interstate commerce or its instrumentalities. * * *

"There can be no doubt that communications by radio constitute interstate commerce. It has been so held by numerous courts, and the decisions of the Supreme Court of the United States defining interstate commerce lead to that conclusion. Gibbons v. Ogden, 9 Wheat. 1, 189, 6 L. Ed. 23; Pensacola Tel. Co. v. Western Union Telegraph Co., 96 U. S. 1, 24 L. Ed. 708; Blumenstock Bros. Adv. Agency v. Curtis Pub. Co., 252 U. S. 436, 40 S. Ct. 385, 64 L. Ed. 649; Western Union Telegraph Co. v. Speight, 254 U. S. 17, 41 S. Ct. 11, 65 L. Ed. 104; Whitehurst v. Grimes (D. C.) 21 F. 2d 787; Gen. Elect. Co. v. Fed. Radio Comm., 58 App. D. C. 386, 31 F. 2d 630; U. S. v. American Bond & Mortgage Co., (D. C.), 31 F. 2d 448; Tech. Radio Lab. v. Fed. Radio Comm., 59 App. D. C. 125, 36 F. 2d 111, 66 A. L. R. 1355; City of N. Y. v. Fed. Radio Comm., 59 App. D. C. 129, 36 F. 2d 115."

"No state lines divide the radio waves, and national regulation is not only appropriate but essential to the efficient use of radio facilities." (*Federal Radio Comm.* v. *Nelson Bros.*, 289 U. S. 266, 53 S. Ct. 627, 77 L. Ed. 1166.)

In Whitehurst v. Grimes (1927), 21 F. 2d 787, wherein a Kentucky city passed an ordinance requiring all

persons operating a radio broadcasting station to pay a license tax, the court said: "The tax provided is not on the property of the radio operator, but on the business of radio broadcasting. Radio communications are all interstate. This is so though they may be intended only for intrastate transmisison, and interstate transmission of such communications may be seriously affected by communications intended only for intrastate transmission. Such communications admit of and require a uniform system of regulation and control throughout the United States, and Congress has covered the field by appropriate legislation. It follows that the ordinance is void as a regulation of interstate commerce."

I think, however, that the Supreme Court of the United States, in the case of *Fisher's Blend Station* v. *Tax Commission,* (1936), 297 U. S. 650, 56 S. Ct. 608, 80 L. Ed. 956, has definitely settled all issues presented here in favor of the appellees and the case should be affirmed. This latter case came to the U. S. Supreme Court from the State of Washington. The Washington Supreme Court had held a State statute levying an occupation tax on the gross receipts from broadcasting within the State to be constitutional. The U. S. Supreme Court reversed the Washington Court and held the tax to be an unconstitutional burden on interstate commerce. I quote rather extensively from the opinion written by the late Justice Stone: "Appellant is thus engaged in the business of transmitting advertising programs from its stations in Washington to those persons in other states who 'listen in' through the use of receiving sets. In all essentials its procedure does not differ from that employed in sending telegraph or telephone messages across state lines, which is interstate commerce. (Citing many cases.) In each, transmission is effected by means of energy manifestations produced at the point of reception in one state which are generated and controlled at the sending point in another. Whether the transmission is effected by the aid of wires, or through a perhaps less well understood medium, 'the ether,' is immaterial, in the light of those practical considerations which have dictated the conclusion that the transmis-

sion of information interstate is a form of 'intercourse,' which is commerce. See Gibbons v. Ogden, 9 Wheat. 1, 189, 6 L. Ed. 23, 68.

"Similarly, we perceive no basis for the distinction urged by appellee, that appellant does not own or control the receiving mechanisms. The communications broadcasted are no less complete and effective, nor any the less effected by appellant, because it does not own or command the apparatus by which they are received. The essential purpose and indispensable effect of all broadcasting is the transmission of intelligence from the broadcasting station to distant listeners. It is that for which the customer pays. By its very nature broadcasting transcends state lines and is national in its scope and importance—characteristics which bring it within the purpose and protection, and subject it to the control, of the commerce clause. See Federal Radio Commission v. Nelson Bros. Bond & Mortg. Co., 289 U. S. 266, 53 S. Ct. 627, 77 L. Ed. 1166, 1175, 89 A. L. R. 406."

The majority opinion appears to lean rather heavily upon the following language (which was mere dicta) used in the Fisher's Blend case: "Whether the state could tax the generation of such energy, or other local activity of appellant, * * * it is unnecessary to decide. See Atlanta v. Oglethorpe University, 178 Ga. 379, 173 S. E. 110."

It is interesting to note that the Georgia case cited in support, of the gratuitous language used, has been twice overruled since the Fisher's Blend decision. See *Atlanta* v. *Southern Broadcasting Co.* (Ga.-1937), 184 Ga. 9, 190 S. E. 594, and *Atlanta* v. *Atlanta Journal Co.* (Ga. 1938), 186 Ga. 734, 198 S. E. 788.

We also must bear in mind the well established rule that where there is any doubt as to the validity of a tax, such doubt must be resolved in favor of the taxpayer. *City of Little Rock* v. *Ark. Corp. Comm.*, 209 Ark. 18, 189 S. W. 2d 382, and *McFeeley* v. *Comm.*, 296 U. S. 102, 56 S. Ct. 54, 80 L. Ed. 83, 101 A. L. R. 304.

In view of the authorities above cited, it seems to me that there could be no doubt but that the taxes imposed here are unconstitutional.

The decree should be affirmed.

CENTRAL FLYING SERVICE *v.* CRIGGER.

4-8715 221 S. W. 2d 45

Opinion delivered May 30, 1949.

Rehearing denied July 4, 1949.

Buzbee, Harrison & Wright, for appellant.

J. J. Screeton and *Miles & Amsler,* for appellee.

ED. F. MCFADDIN, Justice. This action is an effort to hold appellants liable because they rented an airplane to a person whose conduct caused the death of appellees' son.

Appellants, Garbacz and Holbert, are partners owning and operating the Central Flying Service in Little Rock. Vernon Wilkerson was a young man interested in aviation. He held a student's permit which allowed him to rent and fly a plane, but not to carry passengers. On March 23rd Wilkerson rented a plane from appellants for three days in order to fly to Forrest City and attend a fraternity convention; and while there, on March 24th, he took his fraternity brother J. W. Crigger, on a flight. The plane crashed and both Wilkerson and Crigger were killed.

Appellees (plaintiffs below), as the parents and legal representatives of Crigger's estate, brought this action against appellants (defendants below) to hold them liable for his death. The theory of alleged liability was: (1) that Wilkerson was notorious for his recklessness[1] in the operation of an airplane; (2) that Crigger was killed because of the said recklessness[2] of Wilkerson; (3) that appellants had actual or imputed knowledge

[1] For brevity, we have used here the word "recklessness." The complaint used a more comprehensive term, *i. e.*, "wilfull and wanton negligence and misconduct." In this opinion "recklessness" includes the comprehensive term.

[2] See footnote preceding.

of Wilkerson's recklessness;[3] and (4) that in renting the plane to Wilkerson with such knowledge, the appellants became liable for all of his acts. Appellants denied liability; but a jury trial resulted in a verdict and judgment against appellants; and this appeal challenges that judgment.

We are presented with the question of the tort liability of one who rents an airplane to another; and very few relevant cases can be found. In Brewer v. Thompson, *ante,* p. 164, 219 S. W. 2d 758, a person legally riding as a passenger in a rented plane being operated by the bailee sued the bailor for damages, on the theory that the plane was defective. We denied recovery, because there was no proof of negligence on the part of the bailor. The decision in that case turned on the absence of negligence. In 4 A. L. R. 2d page 1306 there is an annotation entitled, "Tort liability of one renting or loaning airplane to another"; and this annotation comments on the paucity of cases and also the failure of even the few cases to bottom the holdings on a uniform legal principle.

Arkansas has never adopted the Uniform Aeronautics Act; instead, the Arkansas General Assembly of 1941 by § 13 of Act 457 provided:

"The liability of the owner or pilot of an airplane carrying passengers, for injury or death to such passengers, shall be determined by the rules of law applicable to torts on the lands or waters of this State arising out of similar relationships." Both sides to the present litigation concede the validity and applicability of the quoted section. Since the bailment of a motor vehicle presents, in many instances, an analagous situation to the bailment of an airplane, we turn, then, to the automobile cases for applicable rules. Our cases recognize that one who rents an automobile to a known reckless

[3] The Uniform Aeronautics Act was approved by the National Conference of Commissioners on Uniform State Laws in 1922. It may be found in vol. eleven, Uniform Laws Annotated, page 157. On page 274 of the 1948 Cumulative Annual Pocket Parts for said vol. 11, it is stated that this Uniform Aeronautics Act was withdrawn by the National Conference of Commissioners on Uniform State Laws in August, 1943.

driver is liable for the damages which reasonably and proximately result from the reckless driving of such bailee. See Layes v. Harris, 187 Ark. 1107, 63 S. W. 2d 971; Chaney v. Duncan, 194 Ark. 1076, 110 S. W. 2d 21; McAllister v. Calhoun, 212 Ark. 17, 205 S. W. 2d 40.

Apparently attempting to follow the rationale of these cases, the trial court instructed the jury, at the request of the plaintiffs, and over the general and specific objections of the defendants, as follows:

"You are, therefore, instructed that if you find from a preponderance of the evidence in this case that the defendant, Central Flying Service, leased or rented an airplane to Vernon Wilkerson as alleged in the complaint and if you further find from a preponderance of the evidence that at the time said airplane was rented or leased to Vernon Wilkerson the defendant knew, or by the exercising of ordinary care could have known, that Vernon Wilkerson by reason of his want of age or experience, his physical or mental condition, or his known habit of recklessness was incompetent to safely operate the airplane, and if you further find from the evidence that because of reckless and negligent operation of said plane, if any, by Vernon Wilkerson, J. W. Crigger lost his life you are told as a matter of law that the action of the defendant(s) in leasing or renting said airplane to Vernon Wilkerson will be deemed to be the proximate cause of the death of J. W. Crigger and your verdict will be for the plaintiffs."[4] A careful review of the record discloses sufficient evidence to take the case to the jury on the questions (1) whether Wilkerson was notorious for his recklessness; (2) whether Crigger was killed because of said recklessness; and (3) whether the appellants had actual or imputed knowledge of Wilkerson's recklessness. But we hold that there was no sufficient evidence to support the finding that the appellants could have reasonably anticipated that Wilkerson would take a passenger in the plane while he had it rented.

[4] The latter portion of this instruction is erroneous.

According to the rules of the Civil Aeronautics Board,[5] which are controlling here, anyone sixteen or more years of age, who satisfactorily passes a mental and physical examination, may receive a student permit; after six hours of flying with an instructor—and upon approval of the instructor—the student is eligible for a solo flight; after other required hours of solo flying, the student may take a cross-country flight with an instructor, and then a solo cross-country flight; upon completion of 35 hours of flying, and with the approval of a recognized instructor, the student becomes eligible for a pilot's license. Only a person holding a pilot's license is permitted to take a passenger in the plane; but anyone holding a student's permit, who has completed his solo flight and his cross-country flight with an instructor, is eligible to rent a plane from any flying service. Wilkerson held a student's permit, and had completed his solo and cross-country flights, so it was entirely legal for the appellants to rent the plane to him. Wilkerson did not have a pilot's license, so he could not legally take a passenger in the plane.

We find no facts that could have imputed to appellants—when they rented the plane to Wilkerson—any reason to believe that he would take a passenger in the plane in violation of the regulations of the Civil Aeronautics Board. As one witness expressed it, "he was an eager beaver about flying." He was anxious to get his pilot's license. The only former indiscretion, of which he was definitely shown to have been guilty, was one act of low flying which occurred several months before the events here. He had been disciplined for this low flying, and then allowed to resume the renting of planes. No reasonable person could have been required to foresee, on March 23rd when the plane was rented to him, that the next day Wilkerson would endanger his entire avia-

[5] "The Civil Aeronautics Act of 1938" was enacted by the Congress of the United States on June 23, 1938, c. 601. 52 Stat. 977. It may be found in U. S. C. A. title 49, § 401, *et seq.* Under the Civil Aeronautics Act the rules for the licensing of pilots, etc., are prescribed and regulated by the Civil Aeronautics Board. Some of the rules and regulations of the Civil Aeronautics Board were referred to in our recent case of West Memphis Flying Service v. American Aviation, etc., Co., *ante*, p. 6, 219 S. W. 2d 215.

tion career and lose even his student permit, by taking a passenger in the plane.

In our automobile cases previously cited, we have said that one renting a car to a known reckless driver may be liable for injuries resulting from negligence of the driver. But that statement means that the negligence upon the part of the driver must be in the operation of the car; it does not mean that one renting a car to a reckless driver becomes liable for any other act of indiscretion—*e. g.,* kidnapping—done by the driver of the car and not proximately connected with the driving. The damage must flow from the driving of the car, and not from the separate tort of the driver. There is an exhaustive annotation in 168 A. L. R. 1364 entitled, "Common-law liability based on entrusting automobile to incompetent, reckless or unlicensed driver"; and on page 1369 of that annotation there is a section entitled, "Necessity of causal relation between injury complained of and driver's incompetency, inexperience or unfitness." It is there stated:

"Generally, in order to recover against the owner of an automobile on the ground of his negligence in entrusting the automobile to an incompetent driver, for injuries inflicted by the driver's operation of the car, the plaintiff must establish that the injury complained of was caused by the driver's disqualification, incompetency, inexperience, or recklessness. . . . most cases hold that failure to show that the matter of operation of the offending vehicle arose from or was induced by the disqualification alleged, of the driver to whom it was entrusted by the owner, precludes recovery against the latter under the common-law rule embodying the doctrine of liability for entrustment to an incompetent person."

The necessity of establishing causal connection between the negligence of the driver and the resulting damage is so clear that our automobile cases have shown such connection without stating the necessity for its existence. We have many cases on proximate cause and causal connection. In Wisconsin & Ark. Lbr. Co. v. Scott, 153 Ark. 65, 239 S. W. 391 this Court said: "To constitute

actionable negligence, there must be negligence and injury resulting as the proximate cause of it. Proximate cause has been defined as a cause from which a person of ordinary experience and sagacity could foresee that the result might probably ensue."

Again, in Meeks v. Graysonia, Nashville & Ashdown R. Co., 168 Ark. 966, 272 S. W. 360 this Court said:

"The rule is well established in this State that, in an action for personal injuries, although the defendant may be shown to have been negligent in some manner, yet, *unless the negligence so shown is the proximate cause of the injury complained of, no recovery can be had on account of said injury.* It has been uniformly held that, in order to warrant a finding that negligence is the proximate cause of an injury, it must appear that the injury was the natural and probable consequence of the negligence and that it ought to have been foreseen in the light of the attending circumstances. Pittsburg Reduction Co. v. Horton, 87 Ark. 576, 113 S. W. 647, 18 L. R. A. N. S. 905; St. L. & S. F. R. Co. v. Whayne, 104 Ark. 506, 149 S. W. 333; St. L. Kennett & S. E. Rd. Co. v. Fultz, 91 Ark. 260, 120 S. W. 984; Hays v. Williams, 115 Ark. 406, 171 S. W. 882; and Bona v. Thomas Auto Co., 137 Ark. 217, 208 S. W. 306."

Applying the rules of causal connection and proximate cause to the case at bar, it follows that before the appellants could have been held liable, it was necessary for the appellees to show that the appellants could have reasonably foreseen that Wilkerson, while on his trip to Forrest City, would take a passenger in the plane in violation of the rules of the Civil Aeronautics Board. No such showing was made, nor does the inference arise as a matter of law.

It follows therefore that the judgment of the Circuit Court is reversed, and the cause is dismissed.

Millwee and George Rose Smith, JJ., dissent.

George Rose Smith, J., dissenting. Justice Millwee and I are unwilling to say as a matter of law that the appellants could not reasonably have foreseen the pos-

sibility of Wilkerson's conduct. The renting of the airplane to a reckless pilot had created a potentially dangerous situation; so the intervening action by Wilkerson should not be allowed to break the chain of causation unless a reasonable man would regard its occurrence as highly extraordinary. Rest., Torts, § 447. These appellants were engaged in the business of aviation. It is a fact well-known to fliers that "eager beavers" and "hot pilots" often have a tendency to show off their skill by taking up passengers and performing acrobatics. We think it a question of fact whether the appellants ought to have foreseen the possibility of Wilkerson's doing just this. We therefore dissent from the order of dismissal.

[redacted]

TOPHAM *v.* HODGES.

4-8896 221 S. W. 2d 27

Opinion delivered May 30, 1949.

[redacted]

Owen C. Pearce and *Culbert L. Pearce,* for appellant.

Gordon Armitage, for appellee.

ED. F. MCFADDIN, Justice. The questions presented on this appeal are whether appellees may recover for their improvements, and, if so, in what amounts.

Two vacant parcels of real estate in Kensett, Arkansas, were forfeited to the State for the nonpayment of the 1932 taxes. Title remained in the State until 1940, when appellant by purchase obtained a deed from the State, and has paid all subsequent taxes. By mistake, the parcels were again shown as forfeited to the State for the 1935 taxes, and in 1946 the State conveyed one parcel—hereinafter referred to as parcel 13—to L. W. Hodges, and the other parcel—hereinafter referred to as parcel 14—to Troy Neal, who thereafter conveyed to Scott Lewis. Hodges and Lewis are the appellees here. Shortly after receiving their deeds, Hodges entered into possession of parcel 13 and made improvements, and Lewis entered into possession of parcel 14 and made improvements, as will be hereinafter discussed.

In 1947, appellant filed this suit in the chancery court to cancel the deeds from the State to Hodges and Neal, and the deed from Neal to Lewis. Hodges and Lewis claimed that they were entitled to recover the value of the improvements which they had made; and the evidence was directed to such value. A decree was entered finding and adjudicating: (1) that appellant's title was superior to that of appellees; (2) that Hodges was entitled to recover $75 for the improvements on parcel 13; and (3) that Lewis was entitled to recover $650 for the improvements on parcel 14. Appellant has appealed from so much of the decree as allowed appellees any recovery for improvements; and Lewis has cross appealed from the allowance to him of only $650. We discuss and dispose of the issues in the following topic headings.

I. *Appellant's Argument Concerning the Time Appellees Made the Improvements.* Appellees acquired their deeds from the State in 1946 and this suit was filed in 1947; so appellees' improvements were made within two years from the sale of the land by the State

to Hodges and Neal. Based on that fact, appellant cites and relies on § 13884,[1] Pope's Digest, which reads:

"No purchaser of any land, town or city lot, nor any person claiming under him, shall be entitled to any compensation for any improvements which he shall make on such land, town or city lot, within two years from and after the sale thereof; for improvements made after two years from the date of sale the purchaser shall be allowed the full cash value of such improvements, and the same shall be a charge upon said land."

Appellant insists that appellees cannot recover for any improvements made within two years from the sale by the State to Hodges and Neal. But in this argument appellant is in error, because the "sale" referred to in the above-quoted statute means the *sale to the State for taxes* and not the sale by the State to the purchasers. In the recent case of Gulley v. Blake, 214 Ark. 578, 217 S. W. 2d 257 we decided this same question, saying:

"It is insisted by appellants that most of the improvements claimed by appellee were made by him within two years after the date of his purchase from the State; and appellants argue that under the provisions of § 13884, Pope's Digest, appellee could recover only for improvements made by him more than two years after he obtained deed from the State. . . . . .

"We think the 'sale' referred to in this section is the original sale (whether to State or to an individual) for non-payment of taxes.

"Under § 13860, Pope's Digest, every landowner is given the right to redeem his property from a sale for nonpayment of taxes, if application for such redemption be made within two years after such sale. The evident purpose of the Legislature, in providing in § 13884, *supra,* that a purchaser of lands sold for non-payment of taxes might recover only for improvements made after two years from the sale, was to prevent the owner from being compelled to pay for improvements made within the period allowed for redemption."

[1] This is § 84-1121 Ark. Stats. of 1947.

Since the parcels here involved forfeited to the State in 1933 for the taxes in 1932, and since the improvements were made in 1946 and 1947, it is clear that the improvements were made more than two years after the "sale."

II. *Appellant's Argument Concerning Innocent Purchasers.* Appellant's deed from the State was placed of record in 1941 and constituted constructive notice as provided in § 1846, Pope's Digest. Because of this, appellant insists that appellees purchased with constructive notice of appellant's title, and therefore are not innocent purchasers in their efforts to recover for the improvements. There are at least two answers to appellant's argument.

In the first place, § 13884, Pope's Digest,[2] in allowing the tax title purchaser to recover "the full cash value of such improvements" made after two years from the tax sale—makes no requirement that such improver of the property be an "innocent purchaser." See Wilkins v. Maggard, 190 Ark. 532, 79 S. W. 2d 1003. In the second place, even under our betterment statute[3]—in which the person improving the property must be "believing himself to be the owner"—the notice of paramount title must be *actual* and not merely *constructive.* See Beard v. Dansby, 48 Ark. 183, 2 S. W. 701; Shepherd v. Jernigan, 51 Ark. 275, 10 S. W. 765, 14 Am. St. Rep. 50; and Riddle v. Williams, 204 Ark. 1047, 66 S. W. 2d 893. It is not claimed that appellees had anything more than "constructive notice" in the case at bar.

III. *Amounts Allowed Appellees for the Improvements.* The Chancery Court allowed Hodges $75 for the improvements on parcel 13, and there is no argument that this amount is excessive, so we affirm such award. As to parcel 14, each side feels aggrieved at the Chancellor's award of $650 to Lewis. Appellees' witnesses testified that the improvements consisted of a house, well and orchard; and the itemized cost of making these improvements was shown to be in excess of $1,000. Wit-

[2] This may be found in § 84-1121, Ark. Stats. of 1947.

[3] Section 4758, Pope's Digest, and § 34-1423, Ark. Stats. of 1947.

nesses stated that the "full cash value of such improvements"[4] was $900. On the other hand, appellant's witnesses stated that the house was poorly constructed, of inferior materials, and that the "full cash value of such improvements"[4] was only $500.

After reviewing the entire record, we conclude that the learned Chancellor correctly valued the improvements. We affirm the decree on both direct appeal and cross appeal.

UNITED TRANSPORTS, INC. *v.* JOHNSON.

4-8891 220 S. W. 2d 814

Opinion delivered May 30, 1949.

[4] The quoted words are from § 13884, Pope's Digest, and § 84-1121 Ark. Stats. of 1947.

Louis Tarlowski, for appellant,

G. W. Lookadoo, for appellee.

HOLT, J. Appellee, Buster Johnson, sued appellant, United Transports, Inc., to compensate personal injuries and property damage alleged to have been received when appellee's automobile truck was, by appellant's negligence, forced off the highway, upset and burned. He specifically alleged $1,500 damages to his truck, which he claimed was a total loss, and claimed $3,000 as total damages to his truck and to his person. Appellant interposed a general denial and specifically pleaded contributory negligence of appellee as a bar to recovery.

A jury trial resulted in a verdict for appellee in the amount of $3,000.

For reversal, appellant contends that (1) the evidence was insufficient to support the verdict and judgment, (2) the court erred in giving appellee's instruction No. 2, (3) "the court erred in giving appellee's instruction No. 5 on the measure of damages and value of the destroyed truck," and (4) that the verdict was excessive.

—(1)—

The mishap occurred at about 3:30 a. m., July 6, 1948, on U. S. paved Highway 67, a few miles north of Arkadelphia. Shortly before this mishap, and near the point where it occurred, another truck and a passenger automobile had collided, partially obstructing the highway, and following on the heels of this collision some of appellant's trucks, carrying and transporting automobiles, came upon the scene and parked, some partly on the west side, and others partly on the east side of the highway pavement. Appellant's drivers placed a flare in front and one in the rear of their trucks to warn or signal approaching traffic. A short time thereafter, appellee came upon the scene, driving a truck south, enroute to Texarkana. The evidence tends to show that in endeavoring to stop his truck, appellee went off the highway, and turned over, resulting not only in personal

injuries to himself, but in the complete destruction of his truck by fire.

Appellee testified that he did not see the signal flare until too late to stop for the reason that some of appellant's drivers were sitting on the highway in a position that concealed the flare. The testimony of Charles Fowler, riding with him at the time, tended to corroborate appellee's version. Fowler testified: "A. Well, we were coming along the road there, and I guess—I don't know—we ran right up on them before they tried to stop us or give us any warning, and there were some men sitting there in the road in front of a flare and I guess we got up to about forty feet of them, and they jumped up and started trying to stop us and we didn't have time to stop."

There was evidence that appellant failed to park its trucks on the highway in the manner required by Arkansas Statute (1947), § 75-647, which provides: "In every event a clear and unobstructed width of at least 20 feet of such part of the highway opposite such standing vehicle shall be left for the free passage of other vehicles and a clear view of such stopped vehicle be available from a distance of 300 feet in each direction upon such highway."

On all the evidence presented, appellant insists that it was entitled to a peremptory instruction. We cannot agree. In viewing all the testimony, we must consider it in its most favorable aspect to appellee, it being the province of the jury to pass upon its weight. (*Aluminum Co. of North America* v. *Ramsey,* 89 Ark. 522, 117 S. W. 568.)

When so considered, we are unable to say as a matter of law that there was no substantial evidence that warranted a verdict in appellee's favor.

—(2)—

There was no error in giving appellee's instruction No. 2, which reads: "You are instructed that in this case, if you find from a preponderance of the evidence

that the plaintiff, while in the exercise of due care for his own safety, was forced to bring his truck to a sudden stop and in so doing overturned his truck and damaged it, and suffered personal injuries as alleged in his complaint, because of the negligence of the defendant in stopping its truck at the time and place where it was stopped, when it was practical to stop off said highway, and its negligent failure to keep at least twenty feet of such part of the highway opposite such standing vehicle for the passage of plaintiff's truck and without making a clear view of such stopped vehicle available from a distance of three hundred feet to the north of said truck, you will find for the plaintiff."

Appellant objected generally and specifically "for the reason that it failed to take into consideration the question of contributory negligence of the plaintiff. The instruction ends with the phrase, 'you will find for the plaintiff,' without specifically telling the jury they must consider the contributory negligence of the plaintiff."

We do not agree that this instruction failed to take into consideration appellant's defense of contributory negligence for the reason that such negligence is clearly covered by that part of the instruction which required that appellee, at the time of the injuries complained of, be "in the exercise of due care for his own safety." Obviously, appellee could not have been guilty of contributory negligence if he were exercising, at the time, due care for his own safety. (*Aluminum Co. of N. A.* v. *Ramsey, supra.*)

—(3)—

Appellant's third contention is meritorious and must be sustained.

It appears that the court in its instruction No. 5 correctly told the jury, on the measure of damage to appellee's truck, "that the damage to his truck, if any, would be the difference between a fair and reasonable market value of the truck immediately prior to the accident and a fair and reasonable market value of the truck immediately after the accident."

Appellant specifically objected to this instruction "for the reason that there is no testimony to support this instruction, except that of the plaintiff as to an offer to buy his vehicle."

The only testimony in the record on the damages to the truck appears to be that of appellee alone, which is as follows: "Q. Now, Mr. Johnson, did you know the value of your truck before it burned? A. Well, I cannot buy one back for less than fifteen hundred dollars. Q. What kind of truck was it? A. 1942 Chevrolet truck. Q. A ton and a half truck? A. Yes, sir, bob truck. Q. What is the value of the truck since the fire? A. It hasn't any value to it. It burned up. Q. It completely burned up? A. Yes, sir. Q. It was a total loss? A. Yes, sir. Q. I would like for you to be definite, if you know, about the value of the truck just before it caught on fire and burned up—if you can, state what the value of it was? A. About $1,400," and upon cross-examination, appellee testified: "Q. How did you arrive at the value of the truck you stated while ago? A. I had been trying to sell it. Before that I was working with Harding College, and they gave me a five year job with them, and I decided to sell it. Q. How did you arrive at the value of the truck? A. Because a man offered me $1,400 for it."

The effect of this testimony is that appellee based the value of the truck in question at $1,400 solely "because a man offered me $1,400 for it." This evidence of an isolated offer, however, standing alone as it does is not sufficient to establish market value. Such was the effect of our holding in the recent case of *Golenternek* v. *Kurth,* 213 Ark. 643, 212 S. W. 2d 14, 3 A. L. R. 2d 593. We there said: "The measure of damages—in a case such as this one—is the difference between the market value of the car immediately prior to the injury and the market value immediately after the injury. See Kane v. Carper-Dover Merc. Co., 206 Ark. 674, 177 S. W. 2d 41, and cases there cited. The plaintiff testified that she had been offered $1,500 for the car prior to the collision, and that $800 was the best offer she received after the collision. But this evidence of isolated offers cannot in itself—and it

stands alone in this case—be used by the plaintiff to establish market value. Jonesboro Etc. R. Co. v. Ashabranner, 117 Ark. 317, 174 S. W. 548. In 20 Am. Juris. 341 it is stated: 'As a general rule, proof of mere offers to buy or sell * * * is not competent to show the value of such property.' '' See, also, *Southern Bus Co.* v. *Simpson,* 214 Ark. 323, 215 S. W. 2d 699.

—(4)—

In view of our conclusions, it becomes unnecessary to determine whether the verdict was excessive.

For the error indicated, the judgment is reversed and the cause remanded for a new trial.

METROPOLITAN CASUALTY INSURANCE COMPANY
v. FAIRCHILD.

4-8898 220 S. W. 2d 803

Opinion delivered May 30, 1949.

Huie & Huie, for appellant.

John H. Lookadoo, James T. Gooch and *Agnes F. Ashby,* for appellee.

MINOR W. MILLWEE, Justice. This is an action to recover accident benefits on a policy of insurance issued to appellee, Warren C. Fairchild, by appellant, Metro-

politan Casualty Insurance Company of New York, on June 21, 1937. The policy provides for the payment of accident indemnity of $50 per month in case of total disability resulting from accidental injury. It specifically insures against "the effects resulting directly and exclusively of all other causes, from bodily injury sustained during the life of this policy solely through external, violent and accidental means".

Trial before the circuit court, sitting as a jury, resulted in a judgment in appellee's favor for accrued disability payments plus the statutory penalty and attorney's fee. The court found that appellee was totally disabled from coronary occlusion which was caused by an accidental injury within the meaning of the policy.

Appellant earnestly insists that the evidence is insufficient to support the finding and judgment of the trial court. The facts are undisputed. Appellee was employed as chief engineer and ice puller for the Southern Ice Company at Arkadelphia for several years prior to February 2, 1948. On that day he was engaged in thawing a frozen valve on a storage tank on top of the building housing the ice plant. The storage tanks were about sixteen feet above the roof of the building. Appellee stood with his left foot on a rod which connected and supported the tanks and was leaning over in a strained position with most of his weight resting on his left arm and reaching over with his right arm using a blowtorch to thaw the frozen valve. While in this strained position he felt a severe pain in his chest and left arm. When the pain grew steadily worse a physician was summoned who diagnosed the case as either a strained muscle or a coronary occlusion, based upon the history given by appellee. An electro-cardiogram was made about three days later which disclosed a coronary occlusion.

Appellee's physician testified that coronary occlusion is a disease caused by a rupture of a blood vessel in the heart. He gave it as his unqualified opinion, based on the case history and testimony of appellee, that the disease was not present prior to, but was precipitated by, the unusual strain from the position in which ap-

pellee was placed in thawing the frozen valve. It was also shown that appellee was healthy and accustomed to hard manual labor prior to the injury, which rendered him totally disabled. The effect of appellee's testimony is also that he had engaged in thawing valves before, but not on the same tank or in the strained position employed at the time he was stricken.

The conflict in the authorities on the question here presented is stated in 29 Am. Jur., Insurance, § 1006, as follows: "The difference of opinion as to whether accidental means may consist of an unusual and unexpected result of a voluntary and intended act is reflected in the cases dealing with death or injury resulting from exertion or strain. A number of cases—in accordance with the rule that accidental means cannot consist of a voluntary act, and that it is not enough that the death or injury is unusual and unexpected, but that the cause must also be unusual and unexpected—have denied recovery on account of death or injury resulting from the insured's voluntary act involving exertion, over-exertion, or strain. . . . In other cases, however, the view has been taken that where death or injury following over-exertion or strain is unforeseen and unexpected, and is not such as to naturally and probably result from the voluntary act done, but is rather an unusual result, such death or injury is an accident or is effected by accidental means." Opposing counsel have cited cases from other jurisdictions in support of their respective contentions. Many cases demonstrating the conflict in the authorities are collected in 111 A. L. R. 630, which supplements six prior annotations there cited.

In support of the second view as above stated, the textwriter cites Standard Life & Accident Ins. Co. v. Schmaltz, 66 Ark. 588, 53 S. W. 49, 74 Am. St. Rep. 112. There the insured, a mechanic, in lifting and removing a cylinder head from an engine, suffered a ruptured blood vessel in the stomach which caused his death. Justice Battle, speaking for the court in that case, said: "In the case before us the deceased was a strong, muscular man. The cylinder head removed weighed only eighty

pounds. He had been engaged in the service in which he was employed at the time of his death seven or eight years, and in that time had frequently removed cylinder heads without detriment to himself. Other machinists had been accustomed to do the same kind of work without injury. The jury could have reasonably inferred from the evidence that the death of the deceased was caused by 'external, violent and accidental means.' "

In Continental Casualty Co. v. Bruden, 178 Ark. 683, 11 S. W. 2d 493, 61 A. L. R. 1192, we held that heat prostration, or sunstroke, suffered by one unexpectedly is within the terms of a policy insuring against bodily injuries sustained through external, violent and accidental means. See, also, U. S. Fidelity & Guaranty Co. v. Hoflinger, 185 Ark. 50, 45 S. W. 2d 866. The same result was reached in Washington Fid. Nat. Ins. Co. v. Anderson, 187 Ark. 974, 63 S. W. 2d 535, where death resulted from ptomaine poisoning caused by eating unwholesome food in a cafe.

It will be observed that in those cases which follow the first view as above expressed, the rule is premised in part upon the fact that the death or injury resulted from a voluntary or intentional act carried out in the ordinary way without the intervention of any unusual circumstances. So, if some unforeseen or involuntary movement of the body occurred which, in connection with the voluntary act, brought about the injury, the means would be accidental. This is the effect of the holding in the case of United States M. Acci. Asso. v. Barry, 131 U. S. 100, 9 Sup. Ct. 755, 33 L. Ed. 60, which this court cited with approval in the Schmaltz case, supra. There can be no material difference in principle in holding an injury to be by accidental means in the case of the rupture of a blood vessel in the stomach by handling a heavy piece of machinery, as in the Schmaltz case, supra, and in a case where the rupture of a blood vessel in the heart is caused by an unusual strain, as in the case at bar.

It is also clear from our cases that disability or death results solely and exclusively from accidental means although disease plays a part in the disability or

death, if the disease was due to the accident. We have also held in several cases that, if an accidental injury is the primary or proximate cause of death or disability, it is not material that disease contributed thereto. These cases are cited in the recent case of The Travelers' Insurance Co. v. Johnston, 204 Ark. 307, 162 S. W. 2d 480. In that case we reaffirmed the rule announced in Fidelity & Casualty Co. v. Meyer, 106 Ark. 91, 152 S. W. 995, 44 L. R. A., N. S. 493, where it was held (Headnote 1): "When an accident insurance policy limits liability to 'bodily injuries sustained through accidental means resulting directly, independently and exclusively of all other causes of death,' and it appears that death resulted from an aggravation of a latent disease to which the deceased was subject, an instruction is correct to the effect that the defendant insurance company is liable, under the contract, if death resulted when it did on account of the aggravation of the disease from the accidental injury, even though death from the disease might have resulted at a later period, regardless of the injury."

We conclude that the trial court, sitting as a jury, was warranted in finding that appellee suffered a disabling bodily injury sustained through external, violent and accidental means within the terms of the policy, and that the evidence is substantial and sufficient to support the judgment.

Affirmed.

JACKSON *v.* STATE.

4561 220 S. W. 2d 800

Opinion delivered May 30, 1949.

George F. Edwardes, for appellant.

Ike Murry, Attorney General and *Robert Downie,* Assistant Attorney General, for appellee.

George Rose Smith, J. Appellant was indicted for burglary and grand larceny and appeals from a judgment sentencing him to imprisonment for ten years. Dodd Teague, an accomplice in the commission of the crimes, had pleaded guilty to a separate indictment charging him with the same offenses. The evidence was amply sufficient to sustain the jury's verdict, but the State was permitted to introduce the record of Teague's plea of guilty. We passed upon the same question in *Hammond v. State,* 173 Ark. 674, 293 S.W. 714, and held that the admission of such evidence constitutes prejudicial error. The judgment must therefore be reversed.

[redacted]

Brooks *v.* Smith.

4-8847 220 S. W. 2d 801

Opinion delivered May 30, 1949.

[redacted]

Kenneth C. Coffelt, for appellants.

Ben M. McCray and *Ernest Briner,* for appellees.

George Rose Smith, J. This suit was begun by the appellants, assignees of a contract for the purchase of land, to obtain rescission and damages upon the ground that their participation in the contract was induced by fraud. By cross complaint the appellees asserted that appellants were delinquent in their payments and asked foreclosure of their equitable lien. The chancellor found no merit in the allegations of fraud and accordingly ordered foreclosure. This appeal followed.

Appellant John J. Brooks is the third recently discharged war veteran who has attempted to make a success at farming this land. In 1945 appellees John W. and Mildred Smith listed the property for sale with Burton Real Estate Agency. The listing described 225 acres and recited that there was about $2,000 worth of timber on the land. The property as listed comprised a farm complete with various farm implements, cattle, etc. Burton negotiated a contract with Vernon and Paula Luke, by which the Lukes agreed to purchase the farm for $11,000, of which $2,500 was paid in cash. The contract describes 225 acres but makes no mention of the timber, although it is not disputed that while showing the property Burton informed the prospective purchasers that it included $2,000 worth of timber.

After living on the land for a few months the Lukes employed Burton to sell their equity in the farm. Bur-

ton succeeded in making a sale to W. E. Frizzell, who paid the Lukes for their interest and took an assignment of the contract with appellees. Frizzell in turn became dissatisfied with farm life after a few months and employed Burton to find another purchaser. Burton showed the property to appellants and eventually closed an agreement by which they paid Frizzell $4,500 for his equity and assumed the purchaser's obligations under the original contract. They now seek cancellation and recovery of the payments made.

There are two material allegations of fraud. First, it is established by undisputed proof that appellees have title to only about 212 of the 225 acres, more or less, described in the contract. The discrepancy is attributable to the inclusion in the contract of a twelve-acre tract previously sold by the appellees. We do not think that this shortage in acreage, arising by mistake rather than intentional fraud, is sufficient to require rescission, but appellants are clearly entitled to an abatement of the purchase price to compensate for this deficiency. *Fitzhugh v. Davis,* 46 Ark. 337. Appellants have not asked for this specific relief, but the appellees obtained reformation on the basis of mistake and will be compelled to do equity upon their part. It is shown that the land is worth about $40 an acre; so the appellants must be credited with $480 upon their obligation to offset the deficiency in acreage. To this extent we modify the chancellor's decree.

Second, appellants insist that Burton assured them that the property included merchantable timber worth from $2,500 to $3,000, when in fact the timber was worth not more than $1,497 according to the most liberal estimate given by the appellees' own witnesses. Even so, this does not entitle appellants to a rescission. Whatever representation may have been made as to the value of this timber was made by Burton, who was then acting for and being paid by Frizzell. The appellees had knowledge of the assignment, as the original contract required their approval of any assignment of the purchaser's interest, and in this instance they exacted a payment of $1,000 on the principal debt before giving their consent

to the transfer. But Burton was not acting for the appellees in the Frizzell-Brooks transaction; so Burton's asserted misrepresentations give appellants no cause of action against appellees.

Burton is also an appellee, and appellants urge that he is liable for the false representations concerning the acreage and timber. As to the acreage, appellants will be fully compensated by the abatement of purchase price already allowed. As to the timber, appellants testified that Burton fixed the value at from $2,500 to $3,000, but the testimony for Burton is that he mentioned only $2,000 worth of timber. Fraud must be clearly proved, and the chancellor evidently accepted Burton's version of the matter. Since the timber is worth less than $1,500, the real question is that of Burton's liability for representing it to have been worth $2,000. We need not determine whether this statement of value was made in circumstances justifying reliance thereon by the appellants, for in any event Burton is not liable. Of course an agent may be held responsible for making a statement which he has reason to know to be fraudulent. *Mayhue v. Matthews,* 174 Ark. 24, 294 S.W. 364. But here such knowledge has not been brought home to Burton. Appellees stated in their original listing that the timber was worth about $2,000, and it is inferable that the Lukes and Frizzell authorized the same representation. Burton did not even know exactly where the land lines were and has not been shown to have had any independent knowledge of the timber's value. Hence he was only repeating in good faith a statement authorized by his principal, Frizzell, and cannot be held liable for its falsity. Mechem on Agency (2nd Ed.), § 1458; Rest., Agency, § 348.

Appellants question the remedy of foreclosure, but it is well settled by our decisions that the relation of vendor and purchaser is in substance that of mortgagor and mortgagee, entitling the seller to foreclose his equitable lien. *Manwaring* v. *Farmers' Bank of Commerce,* 139 Ark. 218, 213 S.W. 407. We accordingly remand the cause so that the foreclosure sale may be held. By petition in this court appellants state that since the entry of the decree appellees have sold part of the timber and

should be punished for contempt of court. This is a matter which may more appropriately be considered by the chancellor than by us. The decree restored appellees to possession of the property, and the chancellor should treat them as mortgagees in possession. He may require an accounting for the fair value of any timber sold, regardless of the price actually received, or, if the rights of innocent purchasers have not intervened, may in his discretion cancel the sale. Appellants also allege an error in the calculation of interest, which the appellees admit. We have not been furnished with the correct figures, however, and so leave this adjustment to the chancellor.

Modified and remanded.

PRICE *v.* PRICE.

4-8908 220 S. W. 2d 1021

Opinion delivered June 6, 1949.

Buzbee, Harrison & Wright, for appellant.

Frankel & Frankel, for appellee.

ED. F. MCFADDIN, Justice. The wife has appealed from a divorce decree granted her husband.

On March 26, 1948, Stanley Price filed suit for divorce against Vernie Price on the ground of indignities.[1] Even though Mrs. Price lived in Portland, Oregon, she came to Arkansas to personally testify at the trial on September 15, 1948. The decree rendered for the plaintiff does not specify the ground on which the divorce was granted; but appellee (plaintiff) maintains the decree was correct, either because of (a) indignities[1] or (b) three years separation.[2] We test the correctness of the decree on both grounds.

I. *Indignities.* The parties were married in 1934 and continued to live together as husband and wife until August 15, 1945. Mr. Price was an officer in the Armed Forces in World War II; and while overseas he wrote his wife most endearing love letters. After he returned to the United States and visited his wife, and while awaiting military discharge, he wrote her a letter, dated August 15, 1945, reading in part:

"I had a grand time on my short visit with you and Tony. Now a little word of advice. You should not love anyone as much as I know you love me. It is too tough when you get hurt. You have been the finest wife in the world, but I know as well as anything in the world that you are destined to be hurt again. You should really despise me, then you would be much better off."

[1] Section 34-1202 Ark. Stats. of 1947 lists the grounds for divorce and "indignities" is listed as a part of the fifth ground.

[2] Three years separation is the seventh ground for divorce as listed in § 34-1202 Ark. Stats. of 1947.

The next day (August 16, 1945) he wrote her another letter, which reads in part:

"First, I want to say that I am a coward and very unfair to handle this by mail. It is a rotten way to do it and not at all fair to you, but it seems it is the only way I have guts enough to do it.

"There is no use beating around the bush any longer. I am not coming back to live with you after the war. I want to assure you that it is nothing you have done or said to cause me to make this move. You have always treated me fair and done everything in your power to make me happy. I won't lay it on the war either, even though it has done strange things to a lot of people.

"I presume and hope you will hate me for this. It will be much easier for all, that way."

In testifying, Mr. Price claimed that Mrs. Price had been guilty of indignities towards him, in that she had been a poor housekeeper, had appeared in public with disheveled hair and wearing a soiled dress, and had refused to go with him to Humboldt, Tennessee, to live. This testimony by him is uncorroborated in the main, and is entirely belied by his own letters to her—parts of two having been previously copied—which show that on August 16, 1945, he advised her that he had separated from her for reasons best known to himself. He did not then consider her as being at fault in any way. Without lengthening this opinion by detailing and commenting on all of the testimony, we conclude that the evidence offered on behalf of Mr. Price is entirely insufficient to support a decree on the ground of indignities.

II. *Three Years Separation.* This is the seventh ground for divorce as listed in § 34-1202 Ark. Stats. of 1947. The evidence shows that Mr. Price separated himself from Mrs. Price on August 16, 1945. At the time of the trial in the Chancery Court on September 15, 1948, Mr. Price probably had a matured cause of action based on this ground; but he did not have such a cause of action when he filed his complaint on March

26, 1948, and no pleading was ever filed alleging three years separation. In the course of the trial there were several references to a desire by the plaintiff that the court treat the complaint as amended to allege three years separation; but such references are insufficient in this case to support a divorce decree based on three years separation. We reach this conclusion for either of the two reasons now to be discussed.

(A) We have held that before a trial starts, the plaintiff may file an amendment alleging a cause of action which matured after the filing of the original complaint;[3] but no such amendment was filed prior to the commencement of the trial in this case. We have also held that if a new cause of action be alleged in the course of the trial, then the defendant may waive the right to object to such new cause of action.[4] There was no such waiver here. We have in this case a situation in which the plaintiff, after the commencement of the trial and over the objections of the defendant, sought to allege a new and different cause of action for divorce—i. e., the three years separation.

Even under our liberal rules for amendment of pleadings, we have held that, over the objection of the defendant, a new cause of action should not be permitted in the course of the trial.[5] In Patrick v. Whitley, Mr. Justice BATTLE, after referring to section 6145, Kirby's Digest,[6] said: "Under statutes like this it has been uniformly held that no amendment can be allowed after the commencement of a trial which introduces into the case a new cause of action."
We therefore hold that after the trial commenced, the court should not have permitted the plaintiff to file an amendment alleging three years separation as a ground for divorce, since the defendant objected to such amendment.

[3] Pettigrew v. Pettigrew, 172 Ark. 647, 291 S. W. 90.

[4] Ferguson v. Carr, 85 Ark. 246, 107 S. W. 1177.

[5] Patrick v. Whitley, 75 Ark. 465, 87 S. W. 1179, 5 Am. Cas. 672; Midland Valley Rd. Co. v. Ennis, 109 Ark. 206, 159 S. W. 214; Austin v. Dermott Canning Co., 182 Ark. 1128, 34 S. W. 2d 773.

[6] Now § 1463, Pope's Digest, and a part of § 27-1160 Ark. Stats. of 1947.

(B) We point out that the learned trial court did not permit such amendment to be filed; and we give two excerpts from the record. In the course of the trial this occurred:

"THE COURT: According to your statement, he did have three years separation. ATTORNEY FOR DEFENDANT: He didn't have at the time this suit was filed. THE COURT: He can dismiss this and file another one. ATTORNEY FOR DEFENDANT: If he wants to do that, that is all right."

Then, later, when the attorney for the plaintiff sought to have the three-year separation considered by the court, the following occurred:

"ATTORNEY FOR PLAINTIFF: This is a new cause of action. The cases say where you have a new cause of action and you bring in testimony and it isn't objected to by the defendant, and you ask that the complaint conform to the proof; you can bring that new cause of action; and I will show you cases. THE COURT: You will have to have that separation, I think, outside of the time the case was pending. In other words, it has to be three years and start all over."

The excerpt last quoted contains the final remark made by the trial court on the point; and from the tenor of that remark it is clear that the trial court correctly refused to consider the three years separation as a ground for divorce in this case.

Conclusion: 1. We reverse the decree granting the plaintiff a divorce and dismiss his present suit, but without prejudice to his right to file a new suit under the three-year separation statute.[7]

2. We affirm the award of alimony to the defendant, and allow her an attorney fee of $100 in addition to all attorney fees previously allowed, and we adjudge all costs against the plaintiff.[8]

[7] See Trimble v. Trimble, 65 Ark. 87, 44 S. W. 1040.

[8] See Gabler v. Gabler, 209 Ark. 459, 190 S. W. 2d 975.

E. H. NOEL COAL COMPANY *v.* GRILC.

4-8877 221 S. W. 2d 49

Opinion delivered June 6, 1949.

[redacted]

Harper, Harper & Young, for appellant.

Grant & Rose, for appellee.

HOLT, J. February 8, 1948, three bachelor brothers, Frank, Louis, Jr., and Albin Grilc, were accidently killed by an explosion in a coal mine of appellant, E. H. Noel Coal Company, in Sebastian county. Appellees were their aged parents and the only surviving dependents, within the terms of our Workmen's Compensation Statute, Act 319 of 1939. It was conceded that these three sons were employed by appellant, coal company, at the time of the explosion and received accidental injuries, arising out of and in the course of their employment, which resulted in their deaths. A separate claim for compensation for the death of each son was filed by appellees before the Commission, and a maximum award of $20 per week, to be divided equally between the parents, for the death of each son,—or a total of $60 per week,—was made.

The Commission's award in each case was affirmed by the Sebastian Circuit Court on appeal, where the three claims, identical in effect, were consolidated for trial.

From the Circuit Court's judgment is this appeal.

For reversal, appellant says: "We contend the Compensation Commission erred in making three separate maximum awards, thus creating three separate whole dependencies, when as a matter of fact only one whole dependency actually existed. By these three awards the Commission has directed payment to the father of $10 per week in each case, or $30 for the three, and like sums for the mother, for a combined total payment of $60 per week, which is three times a maximum single award under the Compensation Law. The Commission, in its identical opinion in each case, simply finds the parents were dependents of each deceased son and states that the Commission cannot agree with respondents' contention that compensation for the death of all three sons should not exceed $20 per week. * * *

"We do not think the Compensation Law intended any result which would multiply the maximum payments by three, simply because there were killed three people, each of whom was contributing equally to the support of the same dependents."

The question presented appears to be of first impression under our Compensation Act, supra.

The essential facts appear not to be in dispute. Appellees, the father and mother of these unfortunate men, were aged, infirm, and unable to work, the father being 76 years of age and the mother 70. Appellees owned no property except the house which they built about forty years ago, (the land on which it stands belonging to another coal company, for which appellees paid a nominal rental of $9 per year), two milk cows and a few chickens. They have no income except approximately $15 per month, old age security payments. Until about ten years ago, the father had been an active coal miner, and his three sons, since they were old enough to work, had also worked as coal miners, and each, at the time

of their deaths, was earning approximately $73 per week. These three sons lived with their parents and had never left the parental roof. Since their parents became unable to work, these sons supported them out of their weekly earnings, paying for groceries (which alone at times amounted to as much as $200 per month), clothing, medical expenses, and generally the expenses of maintaining the home and their parents. All of these expenses were shared equally by the three sons, each paying one-third.

The question of dependency presented here is one of fact since there is absent in Act 319, supra, any provision making a parent wholly dependent on any one person. In the recent case of *Crossett Lumber Company* v. *Johnson,* 208 Ark. 572, 187 S. W. 2d 161, we held: (Headnote 2) "The question of dependency is one of fact in the determination of which all the circumstances of the particular case are to be considered." (Headnote 3) "Where the testimony showed that the deceased gave to appellees (his father and mother) as much as one-half of his income it was sufficient to sustain the Commission's finding of fact that appellees were dependent upon the deceased." (Headnote 5) "It is apparent from the reading of the Workmen's Compensation Act that the lawmakers intended to make the word 'dependent' mean something different from the words 'wholly dependent;' and the only difference that can exist is that 'dependency' means partial dependency unless it is stated to mean 'total dependency.'" In that opinion, we approved the following conclusions of law of the Commission: "It is well settled that partial dependency is sufficient to justify an award for compensation. * * * One is a dependent within the meaning of the Workmen's Compensation Law if one relies for support in whole or in part upon the aid of another."

We also approved the following from *Honnold* on Workmen's Compensation, Vol. 1, page 232: "The phrase 'actual dependents' means dependents in fact whether wholly or partially dependent. Hence it was no defense, in proceedings under an act using this term, that petitioner and his family were not entirely depend-

ent on deceased. Partial dependency, giving a right to compensation, may exist, though the contributions be at irregular intervals and of irregular amounts, and though the dependent have other means of support, and be not reduced to absolute want."

See, also, *Arthur Murray Company, Inc.* v. *Cole,* 209 Ark. 61, 189 S. W. 2d 614 and *H. N. Rodgers & Sons Company* v. *Nelson,* 209 Ark. 866, 192 S. W. 2d 972.

Under the topic "Workmen's Compensation: double compensation to dependents in case of death of two or more," 45 A. L. R., page 894, the annotator announces the general rule, in circumstances such as are presented here, as follows: "It is a general rule that unless a workmen's compensation act specifically sets forth who shall be considered to be wholly or partially dependent on the earnings of an employee, dependency, and the extent thereof, are to be determined as questions of fact in accordance with the facts as they existed at the time of the injury to the employee. It seems, therefore, that unless a workmen's compensation act specifically provides that the widow and children shall be presumed, or are conclusively presumed, to be dependent upon the father, the dependents may, in case of the death of two or more of the family, contributing to the support thereof, recover compensation in respect of each. There is, however, but little judicial authority on the specific question.

"In the reported case (*Utah Fuel Co.* v. *Industrial Commission,* 67 Utah 25, 245 Pac. 381, 45 A. L. R. 882, where both father and son met death in the same accident, and the earnings of both were required for the support of the family, it was held that the dependents were entitled to the maximum amount of compensation provided for by the statute, for each death.

"To the same effect in *Hodgson* v. *West Stanley Colliery* (1910) A. C. (Eng.) 229—H. L., wherein it was held that where a father and two sons, all killed in one accident, paid their wages into a common fund for the support of the family, the mother and the surviving children were entitled to receive compensation in respect to the death of each of the deceased. The decision in the

above case was on the ground that there was no presumption of law making the widow and children totally dependent on the father, and not dependent at all on the other two."

Giving to the findings of the Commission the same effect as a jury's verdict, as we must, and a liberal construction to the provisions of Act 319, as we have many times said we should and must do to effectuate its purpose, we hold that the Commission was warranted in finding the evidence sufficient to show that these two parents were each dependent on their deceased sons. Since, as noted above, we have held that one is a dependent who relies for support in whole or in part upon the aid of another, the Commission was justified in holding that the appellees, whether partially or wholly dependent on each son, were entitled to the maximum weekly award, under the Act, in each case.

The conclusions we have reached are supported not only in our own cases, supra, but what appears to be the weight of authority.

Affirmed.

MORLEY, COMMISSIONER OF REVENUES *v.* REMMEL.

4-8947 221 S. W. 2d 51

Opinion delivered June 6, 1949.

Rehearing denied July 4, 1949.

O. T. Ward and *Ike Murry,* Attorney General, for appellant.

House, Moses & Holmes and *William M. Clark,* for appellee.

James M. McHaney, Owens, Ehrman & McHaney, Eugene R. Warren, Bruce T. Bullion and *Moore, Burrow, Chowning & Mitchell, amici curiae.*

FRANK G. SMITH, J. The issue in this case is whether or not Act 234 of the Acts of the 1949 session of the General Assembly increased the rate of income taxes by eliminating income taxes paid the United States Government as an allowable deduction in computing the income taxes due the State. If it did so, it was done in violation of § 2 of Amendment 19 to the Constitution and is invalid for that reason.

Amendment No. 19 was not initiated by the people under the I. and R. amendment to the Constitution, but was proposed by the General Assembly at its regular 1933 session, and was approved at the ensuing general election held Nov. 6, 1934, by a large majority. It was proposed as an amendment to Art. V of the original Constitution, which is the article dealing with the title "Legislative Department," and not as an amendment to Art. XVI, which deals with the title "Finance and Taxation." The relevant portion of the amendment is found in § 2 thereof and reads as follows:

"None of the rates for property, excise, privilege or personal taxes, now levied shall be increased by the General Assembly except after the approval of the qualified electors voting thereon at an election, or in case of emergency, by the vote of three-fourths of the members elected to each House of the General Assembly."

Act 234 of the Acts of 1949 is entitled: "An Act to Amend Act 118 of the Acts of the General Assembly of the State of Arkansas for the Year 1929; to Declare an Emergency; and for Other Purposes," which reads as follows:

"Section 1. That Subsection (c) of § 13 of Act 118 of the Acts of the General Assembly, approved March 9,

1929 (Sub-section (c) of § 14036 of Pope's Digest) is hereby amended to read as follows:

"'(c). Taxes paid or accrued within the income year, imposed by the authority of the United States or any of its possessions, or of any State, territory, or any political sub-division of any state, or territory, or the District of Columbia, or of any foreign country, except Estate, Succession or Inheritance taxes, or except income taxes imposed by this Act, and taxes assessed for local benefits of a kind tending to increase the value of the property assessed for such benefits; provided, however, that the deductions herein allowed for taxes imposed by the authority of the United States or of any of its possessions shall not include any allowances or deductions for federal income taxes paid or accrued by the taxpayer within the income year.'

"Section 2. The provisions of this Act shall be applicable to tax years on and after January 1, 1949, as the term 'tax year,' defined in Sub-section 11 of § 14025 of Pope's Digest of the Statutes of Arkansas.

"Section 3. That § 2 of Act 135 of the General Assembly, approved March 3, 1947, is hereby repealed."

Attached to this Act and as a part thereof appears in § 4 thereof an emergency clause reading as follows:

"Section 4. WHEREAS, it has been ascertained that the increased cost of living has placed heavier demands upon the funds of the State of Arkansas than are presently available, and that unless these available funds are increased and supplemented, the necessary functions of our state government are in serious danger of not providing for the necessary protection and benefit for which it is so designed and intended."

Having this emergency clause, the sufficiency of which to declare the existence of an emergency not being questioned, the Act became effective March 3, 1949, when approved by the Governor.

Section 2 of Act 135 of the 1947 General Assembly reduced the deduction on exemptions previously allowed

of the Federal income tax paid to one-half thereof, instead of the whole amount thereof which had previously been allowed as a deduction.

We have copied in full Act 234 and now, with its provisions before us, attention is called to the fact that it has not one word to say about the rate of taxes or the total amount of taxes.

The basic income tax statute of this State is Act 118 of the Acts of 1929. That act provides that in computing net income for tax purposes a deduction shall be allowed the taxpayer of all income taxes paid the United States. That particular deduction was allowed in full until 1947, when by Act 135 of the 1947 session of the General Assembly, this deduction was reduced to fifty per cent of the income taxes paid by the taxpayer to the United States. This Act was passed by a vote in excess of three-fourths of the members of both houses of the General Assembly and has not been challenged on the ground that it violated Amendment No. 19 to the Constitution. Therefore prior to 1949 all taxpayers, both corporate and individuals, were entitled to a deduction of fifty per cent of the income taxes paid the United States, in computing their state income taxes. This suit challenges the validity of Act 234 of 1949 eliminating this deduction.

Appellee, a citizen and taxpayer of this state, whose income is subject to income taxes due both the state and the Federal Government, filed with the Collector of the state income tax, a report of his income, in which he claimed as a deduction from his total income the exemption allowed by Act 135 of 1947. He was advised by the Commissioner of State Revenues that he was not entitled to that exemption or deduction, whereupon his taxes were computed after disallowing this exemption, and he paid under protest the amount demanded. Whereupon he brought this suit to recover what he alleges was the excess he was required to pay under the provisions of § 14055 Pope's Digest. Upon his appeal from the determination of the Commissioner as to the amount of taxes due, he was granted the relief prayed, and the

Commissioner was directed to return the alleged excess, and from that decree is this appeal.

In passing upon the question thus presented certain legal propositions, which are not in dispute, must be held in mind. One of these, as stated in the case of *Ouachita County* v. *Rumph,* 43 Ark. 525, is that the right to impose taxes upon citizens and property for the support of the state government may be restricted by the Constitution, but needs no clause to confer it.

Another is, as said in the case of *Stanley* v. *Gates,* 179 Ark. 886, 19 S. W. 2d, 1000, in which case it was held that the tax imposed by the Income Tax Act of 1929 was not a property tax and therefore not violative of the equality and uniformity clause of the Constitution (§ 5, Art. XVI), that unless inhibited by some constitutional provision the Legislature has power over all matters of taxation and the collection and disbursement of taxes.

Still another is that the tax may be imposed only upon the net income, which is defined as the gross income of a taxpayer, less the deductions and exemptions allowed by law.

And still another as said in the case of *Cook, Commissioner of Revenues,* v. *Walters Dry Goods Co.,* 212 Ark. 485, 206 S. W. 2d, 742 that, "We think the allowance or disallowance of taxes as a deduction from net income for tax purposes, rests entirely in the legislative discretion, and exists by legislative grace, just as do exemptions."

In other words, while only the net income may be subjected to the payment of income taxes, the power of the Legislature is plenary in prescribing how the amount of the net income may be determined, that is, what credits and deductions may be allowed or disallowed.

It is contended, however, that inasmuch as the Income Tax Act in force when Amendment No. 19 was adopted, allowed the taxpayer the full deduction of the total amount of the Federal Income Tax paid by him, he cannot be deprived of that deduction for the reason

that to do so would increase the amount of his taxes, and that this cannot be done except by a vote of the people, or by an act passed by the affirmative vote of three-fourths of all the members elected to both houses of the General Assembly.

It cannot be questioned, and is not questioned, that the effect of Act 234 will be to increase the amount of the taxes to be paid by all persons who pay federal income taxes, but that is not the question here presented, which is, whether Act 234 has increased the rate of taxes of the taxpayer.

Attention is again called to the fact that Amendment No. 19 makes no reference to the amount of taxes, and Act 234 does not refer either to the amount of taxes or the rate thereof, but deals only with the question of a deduction to be allowed in determining the net income, a subject over which, as was held in the case of *Cook* v. *Walters Dry Goods Co.,* supra, the General Assembly has plenary power. In this connection attention is called to the fact that the opinion in the Cook case just cited was delivered fourteen years after Amendment No. 19 was proposed by the General Assembly.

It is urged that the term "rate for taxes" is sufficient to include and does in fact include, amount of taxes, and it is argued that "§ 2 of Amendment No. 19 was intended to prohibit the enactment by the Legislature of any statute which would result in increasing the burden on the people of the State of Arkansas of the taxes being levied in 1934 when the Amendment was adopted", except by a vote of three-fourths of the membership.

In this connection it may be said that in the Biennial Report of the Department of Revenues for 1944-1946, which is the last published report of that department, there appear statements of the various excise taxes collected, and in the portion thereof dealing with income taxes appears this statement: "Since the low year of 1933 when only $117,000 was collected, there has been a decided increase in the collections of the Income Tax Division. Collections for the fiscal year 1945-46 which

amounted to $3,375,049.51 shows an increase of 2885% over the calendar year of 1933", in which year Amendment No. 19 was proposed.

Of course, the greater part of this increase arose from increased income yet efficient administration of the law no doubt played a prominent part. Of all the various excise taxes collected, that from the sales tax exceeds all others. Of this tax and its collection the Commissioner says in his report (page 43) that, "The Commissioner of Revenues is charged with the administration of the Gross Receipts Tax Law and has promulgated thirty-two supplemental regulations for the proper administration of the Law."

Roughly speaking, taxes may be classed as general and special, and by general taxes, as ordinarily understood, is meant the taxes collected on advalorem assessments for the support of the State, the counties, the cities and towns, and the school districts thereof. These taxes are collected by the local officers.

The rate of the general taxes collected for the use and benefit of the State is fixed by the General Assembly. Other rates for general taxes are fixed by local taxing agencies clothed with that authority, and the sum total of those rates comprise the rate for the general taxes. The rate of taxes is one thing, and the assessed valuation upon which these rates are computed in determining the amount of the taxes is quite another. If one who had just come into the State, or who contemplated doing so, asked what the rate for general taxation was, he might be told that depended upon the city or town or school district, or even the county, in which the property was located, but nowhere would he be told that the rate of general taxation depended upon the assessed valuation, and he would be much surprised to receive that answer, for it would not be true. Rate applied to valuation determined the amount of the taxes, but in the common understanding one means one thing and the other something different.

Rate of taxation in common parlance means the percent of valuation taken as the tax. Valuation is the

ascertained sum to which the rate is applied and amount of taxes means the amount ascertained when valuation has been multiplied by rate.

An examination of many acts levying taxes, both general and special, since and including territorial days, shows that the above terms are used as thus defined. We will discuss some of them later.

It was said in the case of *State ex rel.* v. *Irby,* 190 Ark. 786, 81 S. W. 2d, 419, that the words of the Constitution should be given their plain, common meaning, that is as ordinarily used, and understood, unless there is something in the context to indicate a different intent. In *Ellison* v. *Oliver,* 147 Ark. 252, 227 S. W. 586, it was said that when language used in a constitutional provision is plain and unambiguous, the court cannot seek other aids of interpretation, and again, that when words are plain, clear and determinate, they require no interpretation, and it (interpretation) should be admitted if at all, with great caution and only from necessity, either to escape from absurd consequences or to guard against some fatal error. *State ex rel.* v. *Irby,* supra.

Now it must be conceded, and the concession is freely made, that there are cases in which the term rate of taxation has been used in its generic sense, rather than in the sense in which it is ordinarily employed, and in the sense in which it has been employed in this State from territorial days. In other words, the term must be interpreted in connection with the context in which it was employed.

Cases are cited in which rate of taxation and amount of taxation are used synonymously, notably cases which involved taxes on national banks.

Legislation of an early date was passed to permit taxation of national banks without discrimination against them, yet in several states they were subjected to discriminatory taxation. The leading case involving such legislation is that of *People of the State of N. Y.* v. *Weaver,* 100 U. S. 539, (10 Otto 539), 25 L. Ed. 705, in which, although the same rate of taxation was applied to

national banks as to citizens of that state having capital invested otherwise, the latter were allowed deductions denied the national banks. The legislation leading to that result was declared discriminatory and void for that reason as the same amount of taxes should have been paid in both cases on the same value. In such cases and to prevent discrimination, rate of taxation was held to mean amount of taxes that is the same amount of taxes was payable on the same value to prevent discrimination.

In the opinion in the Weaver case, supra, it was said that the Congress was conferring a power on the states which they would not otherwise have had, to tax shares of national banks, but the legislation imposing a restriction on the exercise of that power manifestly intended to prevent taxation which would be discriminatory, that is the property of the national banks should be subjected to no greater amount of taxes than was imposed on other property of the same value.

The opinion states: "As Congress was conferring power on the States which they would not otherwise have had, to tax these shares, it undertook to impose a restriction on the exercise of that power, manifestly designed to prevent taxation which should descriminate against this class of property as compared with other moneyed capital. In permitting the States to tax these shares, it was foreseen—the cases we have cited from our former decisions showed too clearly—that the State authorities might be disposed to tax the capital invested in these banks oppressively." To prevent this discrimination the court said: "This valuation, then, is part of the assessment of taxes. It is a necessary part of every assessment of taxes which is governed by a ratio or percentage. There can be no rate or percentage without a valuation. This taxation, says the act, shall not be at a greater rate than is assessed on other moneyed capital. What is it that shall not be greater? The answer is, taxation. In what respect shall it be not greater than the rate assessed upon other capital? We see that Congress had in its minds an assessment, a rate of assessment, and a valuation; and, taking all these together, the taxation on these shares was not to be greater than on other moneyed

capital". The same purpose to prevent discrimination controls the decision of the other cases decided by the Supreme Court of the United States cited in the briefs.

Other cases are cited holding that freight rates include the total charge made for the transportation. In these and in similar cases rates would mean total charge because there is involved no question of percentage. But in taxation, rate of taxation means the percent of the assessed or ascertained valuation taken as taxes. We find no statute in our history in which it has been otherwise used.

A subdivision of the chapter on Taxation, Pope's Digest, § 13604, is entitled "Rate of Taxation". The general taxes for the state, for the counties thereof, and for the cities and towns therein and for all school districts of every kind are assessed as mills on the dollar and this is the rate of taxation. Note the following provisions, among others, in the following sections of the digest. "For the support of the common schools of the state, a rate of three mills. For ex-Confederate soldiers, a tax of two mills. For state charitable institutions a rate of 1.2 mills", and so on without exceptions as to all the general taxes. Section 13605, Pope's Digest.

Section 13607 provides that the Auditor before the meeting of the Quorum Courts throughout the State, shall certify rates of percentum for the general property tax.

Section 13611 deals with rates specified for county and school district taxes and directs that these taxes be levied as mills on the dollar.

Section 13612 deals with rates specified for cities and towns and contains the same provision.

The section next following provides that all levies of taxes in cities and towns shall be based upon the appraisement of the county assessor as equalized for the levy of state and county taxes.

An important functionary in our scheme and system of taxation has been the equalization boards, oper-

ating in each of the counties, and by § 13645, Pope's Digest, it is provided that "It (the equalization board) shall raise or lower the valuation of any property to such figure as in the opinion of the board will bring about a complete equalization." Other and recent legislation which we shall not review, is designed to equalize valuations, not only within each particular county, but between the counties of the state. It is submitted that if the decree from which is this appeal correctly construes our revenue laws as meaning that rate of taxation means amount of taxes, and can be changed only by a vote of the people, or by a three-fourths vote of the General Assembly, our equalization laws may be impaired, if not invalidated. Equalization could mean raising as well as reducing assessed values, with the consequent increase or decrease in the amount of taxes paid, and our equalization laws authorize that action.

Section 13653, Pope's Digest, provides rules for valuation of property for purposes of taxation, compliance with which might well increase many assessments of value. May these rules so stated be changed only by a vote of the people or upon the approval of three-fourths of the General Assembly?

In addition to the general taxation to which we have just referred taxes are now derived from some sixty odd other sources, principally excise taxes. These are assessed in some instances at so much per yard, or pound, or gallon or ton, etc., but in all instances when based upon valuation they are assessed at a certain rate percentum thereof. As typical of all others take the income taxes with which we are specifically dealing. Section 14026, Pope's Digest, provides that this tax shall be levied, collected and paid annually at a given percentum of the ascertained net income. This rate increases as net income increases, but whatever the income, the tax is a percent thereof.

This percentum, whatever it may be, is the rate of taxes and Act 234 makes no changes therein, indeed as has been said makes no reference thereto.

The construction of Act 234 given by the court below, makes it mean what it would have meant if it had provided that "the amount of taxes now paid shall never be increased" or the basis thereof changed, if any increase of taxes results from the change except by vote of the people or with the approval of three-fourths of the membership of the General Assembly. The language employed does not admit of that construction. It is contrary to our system of levying taxes and to the general understanding of the words employed, to say that rate of taxes means amount of taxes. As a practical matter, it seems highly improbable that the General Assembly in proposing the amendment intended that all future sessions of the General Assembly should be deprived of the power to legislate as to deductions and exemptions which might increase the amount of some of the various existing taxes, except by a vote not of a majority of its membership, but by three-fourths vote thereof.

In our opinion Act 234 is valid legislation and the decree of the court below will be reversed and the complaint of appellee will be dismissed.

Justices Holt and George Rose Smith, dissent.

HOLT, J., dissenting. I respectfully dissent. The question which we are considering is whether Act 234 of 1949 was constitutionally adopted by the General Assembly in view of § 2 of Amendment 19 of our Constitution, which provides: "Section 2. None of the rates for property, excise, privilege or personal taxes, now levied shall be increased by the General Assembly except after the approval of the qualified electors, voting thereon at an election, or in case of emergency, by the vote of three-fourths of the members elected to each House of the General Assembly."

This Amendment was submitted to the people by the 1933 Legislature and overwhelmingly adopted in 1934 by a vote of 99,223 for, and 25,496 against.

It is undisputed that Act 234 did not receive the vote of three-fourths of the members of the House and Senate.

A solution of the question presented depends upon the meaning of the term "rates" as used in the Constitution and the Income Tax Statute. I think, from the authorities presently referred to, it will be shown that the word "rate" is a most flexible term, depending for its meaning upon the context in which it is used and the result intended to be accomplished by the constitutional provision and statute in which it appears.

As used here, I think that we should hold that it means all the facts embraced in computing the overall rate of the tax, as valuations, exemptions, deductions and percentages, and in order to find the rate, all elements which produce it must be taken into account.

The term "rate" has been variously defined as meaning a tax or assessment; a sum assessed as a tax; a public valuation or assessment of every man's estate; also a percentage upon the valuation of land. The term may apply either to the percentage of taxation or to the valuation of property, or it may refer to the assessment, the rate of assessment, and the valuation taken together." 52 C. J. 1142.

"Bouvier's Law Dictionary, Eighth Edition, defines 'rate' as 'A public valuation or assessment of every man's estate; or the ascertaining how much tax everyone shall pay'."

In *Towne* v. *Eisner,* 245 U. S. 418, 38 S. Ct. 158, 62 L. Ed. 372, L. R. A. 1918D, 254, (1918), Mr. Justice Holmes said: "A word is not crystal, transparent and unchanged; it is the skin of a living thought and may vary greatly in color and content according to the circumstances and the time in which it is used."

The Supreme Court of the United States in *Boyer* v. *Boyer,* 113 U. S. 689, 5 S. Ct. 706, 28 L. Ed. 1089, held that the term "rate" included "the entire process of assessment * * * includes both their valuation and the rate of per cent on such valuation," and if anyone of these items is so changed as to increase the tax, then the tax rate has been increased.

Our National Bank tax cases appear to hold uniformely that the provision that State taxes on National Bank shares shall not be at a "greater rate" than that assessed on other monied capital has reference to the entire process of taxation, including valuation of shares as well as the percentage charged on the valuation. *New York* v. *Weaver,* 100 U. S. 539, 22 L. Ed. 705 (1880); *Pelton* v. *Commercial Nat'l Bank,* 101 U. S. 143, 25 L. Ed. 901 (1880); *Boyer* v. *Boyer,* 113 U. S. 689, 28 L. Ed. 1089 (1885); *Stanley* v. *Albany County,* 121 U. S. 535, 7 S. Ct. 1234, 30 L. Ed. 1000; *Des Moines National Bank* v. *Fairweather,* 263 U. S. 103, 44 S. Ct. 23, 68 L. Ed. 191 (1923); *Central Nat'l Bank* v. *Lynn,* 259 Mass. 1, 156 N. E. 42 (1927); *First Nat'l Bank* v. *Dawson County,* 65 Mont. 321, 213 Pac. 1097 (1923); 59 A. L. R. 18.

In *State* v. *Wiley,* 177 Wash. 65, 31 P. 2d 539, it was contended that an act was unconstitutional since the word "rate"as used in the Constitution did not include valuation but percentage or millage only. In holding that the constitutional provision should not be construed so narrowly, the court said: "As we read the proviso, the key to its interpretation—if interpretation is needed—is the word 'rate'. The word has various meanings, dependent upon its relation to subject-matter and context. It may mean measure, valuation, proportion, or percentage. In relation to taxation, it is used in the sense of valuation or percentage. *State* v. *Utter,* 34 N. J. Law 489; *Coventry Co.* v. *Assessors,* 16 R. I. 240, 14 A. 877; *Lake County* v. *Schroeder,* 47 Or. 136, 81 P. 942; *Ankeny* v. *Blakley,* 44 Or. 78, 74 P. 485. We think the word is used here in the sense of both valuation and percentage."

Section 14030, Pope's Digest, defines net income as "the gross income of the taxpayer less the deductions allowed by this act."

Obviously any change in deductions as attempted by Act 234 here, brings about changes in net income which necessarily changes the rate as specified in § 14026, Pope's Digest, by eliminating federal income tax deductions. Act 234 necessarily, it seems to me, raises the income tax rate, a result prohibited by Amendment 19, in

the absence of a three-fourths affirmative vote of both Houses of the Legislature.

There are two well established rules in construing a constitutional provision:

(1)

The first is to determine the meaning and intention when the electors adopted it. To that end, we should look to the history of the times and examine the conditions and state of things existing when the amendment was adopted. Purpose should always prevail over the letter and a reasonable construction should be placed upon it to the end that the object of the people may not be defeated. *Ragsdale* v. *Hargraves,* 198 Ark. 614, 129 S. W. 2d 967, 123 A. L. R. 993; *Bailey* v. *Abington,* 201 Ark. 1072, 148 S. W. 2d 176, 149 S. W. 2d 573.

In *Lybrand* v. *Waafford,* 174 Ark. 298, 296 S. W. 729, this court said: "It is settled by very high authority that, in placing a construction on a constitution, or any clause or part thereof, a Court should look to the history of the times, and examine the state of things existing when the constitution was framed and adopted, in order to ascertain the old law, the mischief and the remedy. Constitutions, like statutes, are properly to be expounded in the light of conditions existing at the time of their adpotion and the general spirit of the times and the prevailing sentiments among the people," and in *Bailey* v. *Abington, supra,* we said: "The Court, therefore, should constantly keep in mind the object sought to be accomplished by its adoption and the evils, if any, sought to be prevented or remedied. Effect should be given to the purpose indicated by a fair interpretation of the language used. The intent may be shown by implication as well as by express provisions."

With these principles in mind, let us review briefly the situation confronting the people of Arkansas when Amendment 19, *supra,* was enacted.

In 1934, we take judicial notice of the fact that this State, (along with all the others in the Union), was in the throes of the most calamitous depression perhaps in

the history of this Country. There was general unemployment, bread lines were forming, banks were failing, money difficult to obtain, and many of the most thrifty of our people were unable to pay their debts. The Legislature was called in special session to enact moratorium laws of various types, including restrictions on the right to foreclose mortgages and to allow the property owner to pay his taxes by piece meal.

Can it be said that in these circumstances the people intended, by Amendment 19, that their taxes might be increased by our lawmakers directly or indirectly short of a three-fourths vote in both Houses.

It is undisputed that the effect of Act 234 is to increase the income tax of every person who pays a Federal income tax, in fact, it appears to be undisputed that the purpose of this act was to increase and that it will increase the income tax payments on Arkansas taxpayers to the extent of a total of $2,500,000 or more annually.

I think it is obvious that the people had no such intention, that is to make it possible for their taxes to be increased by their deliberate and overwhelming approval of Amendment 19.

(2)

If, under the above rules and authorities, this court should have any doubt about the construction which should be placed upon Amendment 19 and the tax statute, any such doubt must be resolved in favor of the taxpayer. We have repeatedly so held.

"A statute imposing a tax must be strictly construed against the taxing authority. A tax cannot be imposed except by express words indicating that purpose." (*Cook* v. *Ark.-Mo. Power Co.,* 209 Ark. 750, 192 S. W. 2d 210). See also, *Little Rock* v. *Corporation Commission,* 209 Ark. 18, 189 S. W. 2d 382; *Moses* v. *McLeod,* 207 Ark. 252, 180 S. W. 2d 110;; *McLeod* v. *Commercial National Bank,* 206 Ark. 1086, 178 S. W. 2d 496, and *McCain* v. *Crossett Lumber Co.,* 206 Ark. 51, 174 S. W. 2d 114.

To sum up, I submit that the term "rates" as used in Amendment 19 and the income statute, Act 234, in-

cludes the whole tax formula. Act 234, by disallowing any deductions to the Arkansas income taxpayer on his Federal income tax payment, so changes the meaning of net income as to increase the tax rate and the taxes of every taxpayer in Arkansas who pays a Federal income tax.

The decree of the trial court, in my opinion, should be affirmed.

GEORGE ROSE SMITH, J., dissenting. I should like to add a few words to Justice HOLT's thorough analysis. I think the basic fallacy in the majority opinion lies in the fact that the Constitution is being interpreted as if it were a statute. In matters of statutory construction the courts recognize the legislators' skill in the preparation of laws and their familiarity with the meaning of legal terms. Hence it is perfectly proper for a statute to be construed in the light of existing laws and court decisions. But here the question is not one of statutory construction. "We must never forget that it is *a constitution* we are expounding."

Our problem is to determine the intention of the electorate in adopting Amendment 19. In this view, much of the majority opinion is seen to be irrelevant. It is true that several of our tax laws use the word "rate" in a technical sense, but the average voter does not bring to the polls the legal knowledge of a tax consultant. His knowledge of the Amendment was derived from reading its provisions or the summary that appeared on his ballot. The whole purpose of the Amendment, as disclosed by each of its five sections, was to restrict the cost of government and the expenditure of public funds. The Amendment limits appropriations to the sum of $2,500,000 in each biennium and prohibits any increase in existing rates of taxation, with a proviso permitting the General Assembly to exceed either limitation by a three-fourths vote. The taxpayers will be dismayed to learn that in spite of their efforts to curb State expenditures a majority of the legislature may now increase their taxes in innumerable ways, as long as the rate—as that term is sometimes used in law books—is not raised.

This conception of "rate" is actually an incomplete idea, as it necessarily involves a ratio between two separate factors. So close is the interplay between the two factors that the meaning of each is dependent upon that of the other. If the Constitution prohibited any increase in the rate of speed upon the highways in excess of sixty miles an hour, I do not suppose the legislature could evade the prohibition by declaring that an hour shall henceforth consist of thirty minutes. So in this case, the ratio is between a percentage factor and the amount of net income. The scope of each is affected by the meaning of the other. To say that the income tax rate is from one to five per cent is not informative unless we also know the amount of the exemption, the permissible deductions, the brackets for each percentage rate—in short, the entire income tax structure. It does not take a mathematician to see that the amount of the tax depends just as directly upon the method of computing net income as it does upon the so-called rate. For example, the income tax exemption in 1934 was $1,500 for a single person. The court now holds that a majority of the legislature may abolish the exemption altogether, so that a person who would formerly have paid no tax at all will be compelled to pay upon every penny of his earnings. He will receive with some skepticism the majority's assurance that the *rate* of his tax has not been increased in the slightest degree. In like manner the taxpayer who was in the 1% bracket may be moved into the 2% bracket by a change in exemptions or deductions, but still this is said not to involve a change in his rate. There is no need to multiply examples. I am convinced that the average voter approved Amendment 19 in the reasonable belief that it would restrict any change in the tax structure that is designed to levy an increased tax upon a given amount of income, property valuation, or other source of public revenue. I think that by disregarding this fact the majority have emasculated an important provision of the Constitution.

SECURITY STATE FIRE INSURANCE COMPANY *v.* KELLY.

4-8900 221 S. W. 2d 39

Opinion delivered June 6, 1949.

Rehearing denied July 4, 1949.

Ward Martin, for appellant.

Sidney J. Reid and *Jay W. Dickey,* for appellee.

MINOR W. MILLWEE, Justice. Appellant is a farmers mutual fire insurance company organized under Ark. Stats. (1947), § 66-1501. On March 19, 1947, the company issued its policy to appellee, Mrs. L. E. Kelley, insuring her rural home and household furnishings against loss by fire and windstorm in the total sum of $1,500. The insurance was for a period of three years at a stipulated single premium of $65.63.

Appellee suffered a total loss of the property by fire on March 7, 1948. Her demand for payment was refused and this suit followed. Appellant denied liability on the ground that a note given by appellee in part payment of the premium was past due and unpaid at the time of the loss; and that under the terms of the note, policy and by-laws of appellant the policy had, therefore, lapsed and been duly cancelled prior to the fire. This appeal follows a verdict and judgment for appellee in the sum of $1,500.

The sole contention for reversal is that the trial court erred in refusing appellant's request for a directed

verdict because the policy was not in force at the time of the fire. Appellant says it is undisputed that a second note given for the premium was past due and unpaid at the time of the loss.

When appellee made written application for insurance on March 19, 1947, she executed two notes for the premium of $65.63. The first note for $26.25 became due and was promptly paid on or about April 1, 1947. The second note was for $39.38 which represented the balance of the premium. The due date of this note is a sharply disputed question of fact. A copy of the note was introduced in evidence and the original exhibited to the jury. The space in the body of the note providing for time of payment was left blank. In the lower left hand corner of the note opposite and below appellee's signature appears the notation "Due 10-1-47."

Appellee testified that this due date was not on the note when she signed it; that the agent who took her application and to whom she paid the first note stated that the second note would be due in twelve months and that the $26.25 payment represented the amount due for the first year; that she received no notice of delinquency, request for payment or notice of cancellation of the policy prior to the date of the fire; that the agent stopped by her place one time during the Christmas holiday season in 1947, but made no demand for payment or suggestion that the note was due.

Appellee's testimony was contradicted by that of the agent and officers of the company. The agent stated that he wrote the date "10-1-47" when the note was signed, that after the note was due he talked with appellee several times and at his suggestion the company extended the time of payment to January 1, 1948. On cross-examination he stated that he informed appellee at the time the note was executed that $26.25 would be the amount of a premium on a one year contract, but that this amount also represented the down payment on the three year contract which she chose; that he also advised her that she could save six months premium under the three year contract if she "fulfilled her obli-

gation" when the note became due. He testified: "I told her very clearly that the payment should be made on a certain date. Also, I left an envelope and told her if she didn't fulfill her obligation I would make a special trip to her home and change the policy to one year contract so the amount she had paid would take care of her for one year." He later stated that this was not done because appellee did not notify him that she desired to change the policy.

Several dates were stamped or written on the face of the note, the first being September 12, 1947, and the last, January 15, 1948. The office manager of the company stated that on these dates letters or notices were mailed to appellee calling her attention to the fact that the note would be due on a certain date or was past due. He stated that the notation "January 15, 1948" advised her that the note was past due and that the policy had become inoperative and suspended. No copies of such letters or notices were introduced by appellant, but blank forms ordinarily used in such cases were introduced. Appellee denied receiving any communication from the company.

The secretary of the company testified that under company regulations the premium on a three year policy must be paid within the first six months of the life of the policy and that a policy could not be issued on an application providing a longer time of payment. However, the note in question was not payable until six months and 11 days after issuance of the policy if appellant's contention as to the due date is accepted. The evidence does not disclose whether an endorsement appearing on the application showing the due date of the note to be 10-1-47 was placed there before or after appellee signed the application. Both the note and the policy contained the usual provision that the insurance should cease if the note became delinquent.

Appellant cites several cases in which we have upheld the provision of a premium note that the policy should forfeit upon non-payment of the note when due. Some of these cases are Patterson v. Equitable Life Assurance

Society, 112 Ark. 171, 165 S. W. 454; Home Life & Accident Company v. Haskins, 156 Ark. 77, 245 S. W. 181; and Home Life & Accident Co. v. Scheuer, 162 Ark. 600, 258 S. W. 648. The trial court recognized this principle in his instructions to the jury. In appellant's requested instruction No. 4 the jury was told to return a verdict for appellant if the note was past due and unpaid at the time of the loss.

When the evidence is considered in the light most favorable to appellee, we conclude that it was sufficient to warrant the jury's finding that the note in question was not delinquent at the time of the fire. It follows that the trial court did not err in refusing to direct a verdict for appellant.

Affirmed.

METROPOLITAN LIFE INSURANCE COMPANY *v.* STAGG.

4-8868 221 S. W. 2d 29

Opinion delivered June 6, 1949.

Rehearing denied July 4, 1949.

Moore, Burrow, Chowning & Mitchell, for appellant.

Sam Rorex and *Botts & Botts,* for appellee.

FRANK G. SMITH, J. On June 6, 1943, Richard S. Stagg made application to the appellant, Metropolitan Life Insurance Company, for a life insurance policy in the initial amount of $2,046, to H. B. Ament, the agent of the insurance company. Ament had lived at DeWitt, which was insured's home, for about 8 years and was a long time friend of the insured and his family.

Ament forwarded the application for the insurance to the district office of the Company and in due time received the policy from the Company. He countersigned it in the designated place, as was required by the Company, and delivered it to the insured, and each month thereafter collected the premiums and executed the Company's receipt therefor. At the time of the delivery of the policy, and attached thereto and made a part thereof, were certain "war risks" and exemption provisions the pertinent portion of which reads as follows:

"It is agreed that notwithstanding any contrary provision, the following are risks not assumed under this policy.

"(a) Death resulting from an act of war, which act occurs while insured is in the military, naval, or air forces of any country and if outside the continental limits of the United States of America (including Alaska), the Dominion of Canada, and Newfoundland, but only if death occurs within six months after such act.

"If the insured shall die as a result of a risk not assumed, referred to above, the liability of the company shall be limited to the amount, determined as of the date of death, of the reserve on this policy and on any paid-up dividend additions thereto, plus the amount of any dividend accumulations and less any indebtedness on this policy."

The policy contained a double indemnity provision for the payment of an additional sum equal to the initial amount of the policy, in case of an accidental death, which is not here involved. An additional 41¢ per month was charged for the accidental death provision and said additional premium was likewise collected each month during the life of the insured.

On May 4, 1944, the insured was inducted into the military service. He took the usual training and in due time was sent over-seas and into combat. Agent Ament continued to collect the premiums, including the additional premium for accidental death, and as he collected the premium from month to month the wife of the insured, the beneficiary named in the policy, discussed with Ament the fact that the insured was in the military service, and that he was in the combat area. All this Ament admitted, but his testimony is not denied that in advising Mrs. Stagg to continue payment of the premiums (and he offered to assist her in this respect, if necessary) he correctly told her that if her husband was killed in the continental United States he was protected, that only a small percent of soldiers who went into the combat zone were killed, and if he was not killed he would have a cash reserve built up which he could cash if he wished to do so, but that if he were killed over-seas, or in battle, that she would be entitled only to the refund

of the reserve under the policy. This reserve value was tendered and was declined.

It does not appear that Ament told Mrs. Stagg, although he might have truthfully done so, that if her husband became disabled and ineligible for other insurance, he could have the policy in full force, if he kept the premiums paid upon his discharge from the service, so that it cannot be said that Mrs. Stagg was paying for something without value, notwithstanding the provision of the policy exempting the Company from liability in case of death in combat.

The insured was killed in Belgium on January 15, 1945, while in the armed service of the United States, and suit was filed on October 23, 1945, praying judgment for $2,046, with penalty, interest and attorney fees, all of which she recovered in the trial of the case and from that judgment is this appeal.

For the affirmance of this judgment the following argument is made. Ament was a general agent and his action in receiving and remitting all premiums as they fell due constituted a waiver of the provision of the policy exempting the Company from liability under the circumstances here stated. We are cited to decisions of this court, of which there are many, to the effect that general agents of insurance companies may waive the performance of a condition inserted in the policy for its benefit and which, if not waived, would defeat a recovery on the policy.

Conceding without deciding that Ament was a general agent, possessing all authority of a general agent, and that the law in regard to a waiver is as appellee contends, the question remains whether the waiver doctrine is applicable here. We think it is not, as the controlling question is whether the death of insured under the undisputed testimony was a risk against which the insurance had been written. The insurer may unquestionably through the knowledge of its authorized agent, waive provisions of a policy which, if not waived, would defeat a recovery thereon, when with such knowledge, the insurer receives premiums to continue the policy in force,

but it is not the law that through waiver a new policy can be substituted insuring against risks expressly excluded in the original policy.

The opinion in the case of White v. Standard Life Ins. Co., 198 Miss. 325, 22 So 2d 353 reads in part as follows:

"The company has the right to exempt itself from liability for military service and insured and beneficiary had the privilege of paying the dues and continue the policy in force while insured was in the military service, notwithstanding the exemption from liability for death while in such service. Payment of dues is not inconsistent with keeping the policy alive. He might have become disabled or his health become impaired, so he could not obtain insurance after leaving the service. * * * There was nothing inconsistent between the payment of premiums and the existence of the exemption."

In the chapter on Insurance, 29 Am. Jur. § 903, p. 690, it is said: "The doctrines of implied waiver and of estoppel, based upon the conduct or action of the insurer, are not available to bring within the coverage of a policy risks not covered by its terms, or risks expressly excluded therefrom; and the application of the doctrine in this respect is, therefore, to be distinguished from the waiver of, or estoppel to deny, grounds of forfeiture."

This statement of the law accords with the opinion of this court in the case of Hartford Fire Ins. Co. v. Smith, 200 Ark. 508, 39 S.W. 2d, 411, where it was said: "The doctrine of waiver and estoppel cannot be asserted to extend coverage under a contract in which it was excluded by specific language." Among other cases cited in support of this statement is the case of Miller v. Ill. Bankers Life Ass'n., 138 Ark. 442, 212 S. W. 310, 7 A. L. R. 378, which case is very similar as to the facts of this case and which we think is controlling here.

The policy sued on in the Miller case, supra, contained a clause reading: "It is expressly provided that death while in the service in the army or navy of the

Government in time of war is not a risk covered at any time during the continuance or reinstatement of this policy for any greater sum than the amounts actually paid to the company thereon."

The death of the insured in that case occurred while he was in the army in time of war, from a natural cause. The agent who wrote and delivered the policy admitted that he told the insured that it was his construction of the policy that if the insured died of a natural cause, the policy would be paid, but that if he died by violence in battle it would not. The agent collected premiums, knowing that the insured was in the armed services, and it was insisted that there had been a waiver of the clause in the policy above copied. In overruling that contention Chief Justice McCulloch for the court said: "It will be observed that the provisions of the policy now under consideration is not for a forfeiture, but is merely an exemption from liability on account of death occurring under certain circumstances. It is not a case where acceptance of premiums with knowledge of the forfeiture constitutes recognition of the continued valid existence of the policy; nor does the case fall within the principle that a forfeiture is waived where an insurance company when it enters into a contract has knowledge through any of its authorized agents of facts which would work a forfeiture. (Citing cases)"

It was there further said: "There was no forfeiture provided for at all, but the company had, as before stated, the right to stipulate under what circumstances it should be liable. The assured had the right to pay the premium and continue the policy in force while he was in the military service of the Government, notwithstanding the exemption of the company from liability for death occurring during the period of that service, and the mere acceptance by the company of the premium with knowledge of the fact that the assured was in the military service of the Government did not constitute a waiver of the stipulation in regard to exemption."

As to the representation of the agent as to the meaning of the policy it was there said: "Scroggins (the

agent) had no authority to issue policies or to alter or interpret the terms thereof. The policy had already been issued and delivered more than two years before this conversation occurred, and the agent had no duty to perform with respect to the matter, and it was entirely beyond the apparent scope of his authority to advise the assured as to the legal effect of the various clauses of the policy." So here, any statement of Ament, the agent, to the beneficiary, who continued payment of the premiums, cannot operate to enlarge the coverage of the policy which had been written before the insured was inducted into the army.

A case cited and relied upon and extensively quoted from for the affirmance of the judgment here appealed from is that of James v. Metropolitan Life Ins. Co., 331 Ill. App. 285, 73 N. E. 2d, 140. But a headnote in that case reads as follows: "General agents of insurance companies may waive any conditions providing for avoidance or forfeiture of policies by violations of their terms, and an agent collecting premiums due may waive them after knowledge by such agent that the breach of the conditions is the cause of the avoidance or forfeiture."

This is good law as applied to the question of waiver, but as we have said, the question here involved is not one of waiving the condition which if enforced would defeat a recovery, but is one of inclusion of a risk which the policy specifically excluded. Other cases to the effect were cited.

It is alleged that the exclusion here invoked is contrary to public policy, as it tends to retard and discourage enlistment in the army of the United States. A similar argument was made in the Miller case, supra, and was answered with a statement that an insurance company has the right to select the risks against which it will insure.

We conclude that the death of the insured resulted from a risk from which the Company had expressly excluded any liability, and the judgment must be reversed and as the cause has been fully developed the judgment and cause will be dismissed.

4-8897 221 S. W. 2d 24

Opinion delivered June 6, 1949.

T. B. Vance and *James F. Vance,* for appellant.

Smith & Sanderson, for appellee.

GRIFFIN SMITH, Chief Justice. J. W. Pharr executed his last will September 2, 1926, and died April 1, 1928. A son, F. E. Pharr, was named executor, with power to close the estate "without being required to

execute bond, and without [the necessity] of accounting to the Probate Court, or having any probate proceedings other than proving up this will."

After providing for payment of debts the estate, both real and personal, was devised and bequeathed "absolutely and in fee simple" to F. E. Pharr, with the right to manage, invest, reinvest, sell, etc. This power, however, was in the nature of a trust to continue for the lifetime of the testator's wife, Cary Ann Pharr; and during that period the executor or trustee was to pay Mrs. Pharr the net income arising from the estate, . . . "when and as the same may be needed by my said wife."

Cary Ann Pharr died August 7, 1947, and F. E. Pharr died September 1, 1939. State National Bank of Texarkana was appointed to succeed F. E. Pharr as executor, or trustee.

State National, treating itself as trustee accountable to a court of equity, filed its final settlement December 18, 1947, and in a chancery proceeding asked to be discharged. Lessie Surgeon Pharr was named as a defendant; and, with the Bank, is an appellee here. She is the widow and sole devisee of B. C. Pharr, a son mentioned in the second subdivision of Item III of the will, who died November 26, 1947—a little less than four months after his mother. If B. C.'s portion of his father's estate vested without affirmative action by the trustee Bank, when Cary Ann Pharr died, the decree respecting that interest is correct, requiring only a determination of *what* the interest was.

Appellants, some of the defendants below, are the surviving heirs of Elizabeth Pharr Cross, who is mentioned in the will, but who predeceased her father. By testamentary expressions Elizabeth's heirs were to stand in her stead.

The appealing defendants contend that the interest apportionable to B. C. Pharr, if he had lived, lapsed when the trustee failed during B. C.'s lifetime to terminate the trust by an actual distribution of the property.

The appellants also think the Bank's action in making certain payments to Cary Ann Pharr was unauthorized, and that the Bank should be charged with $15,649.22 representing a joint checking account used by J. W. and Cary Ann Pharr.

We deal with the subjects in reverse order.

For many years F. E. Pharr was chairman of the Bank's board of directors, and as such was active in the institution's affairs until shortly before his death. W. B. Oglesby was vice-president and trust officer, and testified. Ledger sheets and signature cards were identified, showing that on July 1, 1927, J. W. Pharr had a credit balance of $3,842.38, designated as account numbered 13,680. Mrs. "C. A. P. Pharr"—identified as Mrs. Cary Ann Pharr—had a separate account, No. 8021. It showed a balance of $3,782.80. On the sixth of July, 1927, new account No. 16,696 was opened in the names of "J. W. or Mrs. C. A. P. Pharr." To this account there was first credited $3,842.38, then $11,500. A credit indorsement of January 1, 1928, was "interest, $306.84." [Seemingly 4% for six months on the two items aggregating $15,342.38]. With this entry the account showed a balance of $15,649.22. When J. W. Pharr died he had a checking account with a balance of $1,430. The money was used to pay expenses not questioned here.

More than nineteen years—April 1, 1928, to August 7, 1947—elapsed between the death of J. W. Pharr and the death of his wife. During that period the trustees collected income on property owned by the decedent, of which slightly more than $10,000 came from commercial stocks. As a result, Cary Ann Pharr's credit balance October 29, 1936, was $28,415.47. Appellants say there was more than $15,000 of unused funds after withdrawals of $13,000 in 1944-'45-'46. The balance was $24,617.95 when Mrs. Pharr died.

The Bank's records fully sustain appellees' contention that it was J. W. Pharr's intention, when the joint account was opened, to establish a relationship whereby Cary Ann Pharr would, if the testator predeceased her,

take by the entirety. The writing was that ". . . each [agrees] with the other, and with the . . . Bank" that the funds were jointly owned, "with the right of survivorship."

We held in *Black* v. *Black*, 199 Ark. 609, 135 S. W. 2d 837, that an estate by the entirety could be created in personal property, and that when B, having a bank account, changed the status in a way making his wife joint owner, the surviving tenant took by the entirety. In that case a distinction was made between the bank deposit and money kept in a lock box. The case is conclusive of the survivorship rights contended for in the appeal here. The transactions clearly show J. W. Pharr's intention that ownership of the balance at the time he died would pass, thus saving Mrs. Pharr the cost and inconvenience of administration and eliminating claims to distributive shares.

Appellants complain that records identified by the witness Oglesby were not sufficient to establish J. W. Pharr's purpose to maintain the joint bank account with right of survivorship, and point to the fact that while serving in the dual capacity of executor of his father's estate, and chairman of the Bank's board of directors, erasures and substitutions were made in respect of the ledger pages. Where the original caption of the account was "J. W. or Mrs. C. A. P. Pharr," a pass book held by C. A. P. Pharr showed that on March 21, 1934, four lines were drawn through "J. W." and "F. E." was written. It is also urged that testimony given by Oglesby and records he introduced were inadmissible under § 2, Schedule, Constitution of 1874.

The constitutional objection, in principle, was decided against appellants' contention in *Mosely* v. *Mohawk Lumber Co.*, 122 Ark. 227, 183 S. W. 187. It was there said that the intent was to prevent a party to the suit from testifying, . . . "and the manager of [the lumber corporation] was not a party to the suit, within the meaning of the [restriction], which does not provide that persons interested in the result of the litigation shall be excluded from testifying." But even if it should

be conceded that Oglesby, acting as the Bank's agent, testified to transactions the Bank had had with J. W. Pharr, most of the records objected to were made at a time when the Bank was not officially serving the administration; and furthermore, Mrs. Pharr had a joint interest in these transactions, and she is not a party to the suit.

Appellants complain of F. E. Pharr's action, and of action of the Bank as Pharr's successor, in permitting Cary Ann Pharr to remain in the family residence rent-free. They also emphasize what is spoken of as improvident administration in paying to the testator's widow all income from investments. Particular stress is laid upon the Bank's action in retaining large deposits at insignificant interest rates. Good judgment, they think, required reinvestment of earnings under Court direction.

It is not urged that estate earnings were greater than the widow's necessities. Rather, it is insisted that private means were sufficient, and that the will discloses the testator's intent. It is true that the will directs payment of the net income "when and as the same may be needed"; and should we construe J. W. Pharr's plan as one reserving the income to actual necessities arising after Mrs. Pharr had exhausted her own funds, appellants would be correct. This, however, is not sufficiently shown to have been the testator's desire. It is pointed out that the income, when apportioned to the entire period affected, amounted to but $525 a year. Unless something appears in the will indicating a different purpose, it is ordinarily presumed that the trustor intended the beneficiary to be supported and maintained from estate income, or as is sometimes the case, from sale of a part of the corpus. See 101 A. L. R., 1461 *et seq.;* Restatement of the Law of Trusts, § 128, Comment "e"; Scott on Trusts, p. 672.

The final assignment of error has to do with the Court's action in holding that B. C. Pharr's interest vested when his mother died, and that inaction of the trustee did not affect his rights.

The will empowered the executor, "in the event he sees fit to do so" [after the widow's death] to divide the estate among those entitled to take, or to reduce it to cash. In either event distribution was to be made "as soon after the death of my said wife as is reasonably consistent with good management and good business."

We agree with the Chancellor that with the death of Cary Ann Pharr, B. C. Pharr acquired an immediate estate. Primarily, but only for life, the testator's concern was for his widow. But secondarily those standing in the relation of child and grandchild were the objects of solicitude. The widow's needs, and these alone, prompted the testator to create the trust. The law favors early vesting of estates. If in circumstances such as we have here there should be read into a testator's will a purpose to postpone investiture until the trustee had acted, it would be possible for all of the beneficiaries to die, and results wholly at variance with the ancestor's wishes could easily follow.

The Supreme Court of Connecticut, in commenting on the rule applicable to early vesting of estates, added: "Another rule of frequent and here of particular application is that if a future time or event is involved, the nature of the interest depends upon whether such future event or time concerns the gift itself or merely the payment of it; when futurity is annexed to the substance of the gift, the vesting is postponed, but if annexed to the time or payment only, the legacy vests immediately." *First National Bank* v. *Somers,* 106 Conn. 267, 137 Atl. 739.

The Chancellor correctly determined the controverted issues, hence the decree must be affirmed. It is so ordered.

Opinion delivered June 6, 1949.

Sloan Blair, Paul E. Gutensohn and *Warner & Warner,* for appellant.

Bates, Poe & Bates, for appellee.

HOLT, J. Appellee, Erma Lee Piles, a minor, by her mother, sued appellant, Sinclair Refining Company, and Jim Audas to compensate personal injuries alleged to have been sustained by appellant's negligence when Erma's mother, Mrs. Young, attempted to light a fire in a heating stove by using what was thought to be kerosene, and a violent explosion occurred.

The defendants below answered separately with general denials and appellant here, Sinclair, specifically denied liability on the grounds that appellee and her mother were guilty of contributory negligence which would bar recovery and that it was not responsible for the acts of the persons who caused the explosion.

When the cause came on for trial, a non-suit was taken as to Audas. The trial jury awarded appellee $2,500 damages against appellant, Sinclair. This appeal followed.

Appellee, a minor, lived with her mother at Hon, Arkansas. In the early morning of February 25, 1947, Mr. Young, her step-father, brought to the home four gallons of a liquid purchased as kerosene from Claud Stewart's store, a short distance away. Mrs. Young, after placing a small quantity of this liquid in a glass, poured it over some wood in a cold wood stove, applied a match, and an explosion immediately followed, severely burning and injuring appellee, who was standing near making candy on an oil stove.

Appellant, in January and early February, 1947, bought two tank cars of kerosene from Atlas Refining Company, a manufacturer and refiner of petroleum products, in Shreveport, La. The cars were shipped to appellant at Waldron, Arkansas, and there received by its agent, Harris, who was, by the terms of a written agreement, in charge of its storage tanks and bulk sales station there. An employee of Harris, Jim Audas, removed the liquid from the tank cars to the storage tanks of Sinclair.

Under the terms of the elaborate and lengthy agreement, Harris assumed charge of appellant's storage tanks and property and made sales and deliveries of appellant's kerosene and gasoline on a commission basis. These products at all times, until sold and delivered, and also tanks and oil containers, were the property of Sinclair. Section 24 of the agreement provides: "Either party may terminate this agreement at any time with or without cause; and upon the termination thereof the Agent shall forthwith deliver to the Company or its rep-

resentatives all equipment, property, products, monies, credits, books of account, and station records of whatsoever form entrusted to Agent or coming under Agent's control."

Throughout the agreement, Harris is referred to as Sinclair's agent, and the agreement is signed by him as Agent. Harris was given an exclusive territory. The proceeds from all sales were the property of Sinclair, duplicate sales slips or forms were furnished by Sinclair for its agent's use in making sales and deliveries, all proceeds collected from sales were deposited to Sinclair's credit in the Bank of Waldron and its agent, Harris, was paid his commissions every two weeks. All checks received by Harris or Audas were made payable to Sinclair. The name of Sinclair Refining Company was on Harris' truck. The duties of its agent, Harris, required him to take proper care of appellant's products, storage tanks, warehouse, and other equipment as well as to solicit, carry on appellant's business at its direction, make deliveries, collect accounts and make reports as indicated. The authority of agent, Harris, to extend credit to customers was controlled by appellant. Appellant furnished all forms used in the business. Sinclair furnished all containers for its kerosene and gasoline. Harris furnished his own truck and a driver, Audas, whom he paid, to make deliveries. Sinclair required Harris to furnish to it the name of his designated agent, Audas, and under the agreement, Harris could only make a change by giving written notice to Sinclair. Sinclair fixed the prices on its products.

Prior to the morning when the explosion occurred and injured appellee, Harris' driver, Audas, delivered thirty gallons of what was thought to be kerosene to a store keeper, Claud Stewart, which Stewart placed in a metal container furnished by Sinclair with its name printed on it. Stewart had an agreement with Sinclair to sell its products which were to be delivered to him through its agent, Harris. Appellee's step-father, Young, purchased four gallons of the liquid taken from this tank, thought to be kerosene, and sold to him as such,

carried it to his home, and, as noted, the explosion occurred when Mrs. Young poured a small amount of the liquid from the four gallon can over wood in a cold heating stove and applied a lighted match.

There was evidence that this liquid sold as kerosene was tested and shown to contain 15% gasoline and that any liquid containing as much as ½ of 1% gasoline is unsafe for use as kerosene. There was evidence that a sample of kerosene taken from one of the cars in question flashed at 136° Fahrenheit and that from the other car at 134°. Our statute (Ark. Stat. (1947), § 53-604) requires that "no oils or fluids—which ignite or burn (Called Fire Test) at any temperature less than 140 degrees Fahrenheit—shall be offered for sale or used for illuminating or heating purposes within the State, etc."

It is also required that "when any person, firm or corporation shall receive within this State any of the petroleum oils mentioned in this act for the different purposes mentioned in this act, he shall at once notify the Commissioner of Revenues, or one of his deputies or inspectors, of the quantity of said oils received, and request the inspection of same." (Ark. Stat. (1947), § 53-608). There was evidence that appellant received the two tank cars of kerosene in this State and failed to notify the Commissioner of Revenue, or to comply with the statute.

We do not attempt to detail the testimony. The record is voluminous. It suffices to say that after a careful review of the evidence, we have concluded that the relationship between appellant, Sinclair, and Harris was that of principal and agent and that in the circumstances Harris was not an independent contractor and Audas his servant.

As we read the agreement between Sinclair and Harris, and interpret it in the light of the actions and conduct of the parties to it, we think that it was the purpose of Sinclair to retain complete control of all that was done in connection with the sale and delivery of its kerosene, gasoline and products, and that when we give to

the testimony its strongest aspect in favor of appellee, as we must, it warranted a finding that Harris and Audas, Harris' driver, were servants of the company and under its control and supervision.

The agreement, in addition to providing that agent, Harris, should furnish his own truck, provided that he should furnish (subject to appellant's approval) and pay out of his own funds a driver, and be responsible for, and hold appellant blameless for, any negligent acts of such driver (Audas here). Appellant contends that for this court to hold, in the circumstances, that Harris was not an independent contractor and Audas his servant for whose acts Harris would be responsible, would be contrary to our holding in *Magnolia Petroleum Company* v. *Griych,* 206 Ark. 352, 176 S. W. 2d 435. We cannot agree. That case is distinguishable on the facts. While the written agreement in that case was similar to that in the instant case, such agreement would not altogether control the relationship between the parties. Their acts and conduct, and what they did under the agreement may be taken into account in determining that relationship. Here, there is evidence (absent in the Griych case) that would warrant an inference that Sinclair intended or consented that Audas (as well as Harris) was to be its servant or agent, when the agreement is interpreted in the light of appellant's conduct, supervision and control over Harris and Audas.

The principles of law announced in *Magnolia Petroleum Co.* v. *Johnson,* 149 Ark. 553, 233 S. W. 680, a case in which the facts are strikingly similar, in effect, to the instant case, apply with equal force here. There this court said: "The insistence is that the undisputed evidence shows that Smith was an independent contractor, and that the drivers of the wagons were the servants of Smith.

"The majority of the court are of the opinion that the facts stated made a case for the jury, and that the contract between the company and Smith created the relation of principal and agent, and that the company had reserved the right to control and direct the manner

of making deliveries of oil, and that, while no directions were given in the particular instance as to the manner of delivering the oil to appellee, which caused the fire that destroyed the barn, the company had reserved the right of direction; and, in the discharge of all duties, whether performed by Smith himself or by men employed by him, in selling and delivering the oil, the work done was that of the company.

"We recognize, of course, that the designation of Smith as 'agent' in the contract is not conclusive of the relation. *J. R. Watkins Medical Co.* v. *Williams,* 124 Ark. 545, 187 S. W. 653. The test is, not whether the company actually directed the manner of the delivery of the oil, but is whether the company had the right to control the delivery. 14 R. C. L., § 67, of the article on Independent Contractors. And the majority are of the opinion that the contract between the company and Smith, as interpreted by the conduct of the parties under it, shows that it was the purpose of the company to retain complete control of everything done in connection with the sale and delivery of the oil, and that the testimony, in its entirety, warranted the finding that the drivers of the wagon were themselves the servants of the company."

In *Monk* v. *Jones,* 190 Ark. 1117, 83 S. W. 2d 526, we said: "The mere fact G. P. Scarborough was working for his co-appellees on a commission basis, and that he furnished the conveyances in which the merchandise was transported and also hired and fired the employees retained by him, is not conclusive that he was an independent contractor. We so expressly decided in Magnolia Petroleum Co. v. Johnson, supra," and in *Houston Oil Company* v. *McGuire,* 187 Ark. 293, 59 S. W. 2d 593, we said: "The test of the fluid as analyzed by Dr. Rose showed it contained 96 per cent. of gasoline and ignited at a temperature of 88 degrees, when the statute (§ 5903, Crawford & Moses' Digest, as amended by Act 277 of 1923) provides that, if the fluid ignites at a temperature of less than 140 degrees, it shall not be offered for sale for illuminating and heating purposes. * * *

"It certainly was not kerosene of the grade required by the statute for heating purposes, and it makes no difference where the mistake was made, since it was made by appellant or its agents."

We are also of the opinion that the jury was warranted in finding that there was no negligence, in the circumstances, on the part of either appellee or her mother, Mrs. Young. We are unable to find any negligence at all on the part of either.

As indicated, there was evidence that the oil which was purchased by Mr. Young for kerosene, as he had a right to assume, was a mixture of kerosene and gasoline, which would burn or flash at a point below 140° Fahrenheit, and chemical tests showed that it contained 15% gasoline, and was not safe for use in making a fire as was attempted here.

As was said in *Goode* v. *Pierce Oil Corporation,* 171 Ark. 863, 286 S. W. 1009, "it is a matter of common knowledge that refined kerosene is used to furnish light and as fuel for oil stoves. It is also commonly used in kindling fires. Hence in the absence of contributory negligence by the plaintiff, the evidence for the plaintiff was sufficient to allow a recovery by her."

We cannot agree that the jury's verdict was based upon speculation or conjecture. There was substantial testimony, both direct and circumstantial, sufficient to take the case to the jury on the question of appellant's negligence, in the circumstances.

Appellant complains because the court gave instruction No. 1, on its own motion, because said instruction was given in the language of the Arkansas Inspection Statutes, (Ark. Stat. (1947), §§ 53-604 and 53-608), and concluded with: "So, in this case if you find from the evidence that the defendant did not comply with the statute, then you may take such fact, together with all the other facts or circumstances in evidence into consideration in determining whether the defendant was negligent or not."

There was no error in this instruction. The language used in the two sections of the statute is unambiguous, clear and understandable from the layman's viewpoint. We have many times held that it was not error to give an instruction in the words of a statute when they are simple declarations of law which no person of reasonable intelligence could misunderstand. (*Missouri Pacific Transportation Company* v. *Parker, Admr.,* 200 Ark. 620, 140 S. W. 2d 997).

Other assignments of error by appellant relate to the giving, and refusal to give, certain instructions. In this connection, it suffices to say that we have examined all of the instructions, including those complained of and find that they correctly declared the law as applied to the facts.

Finding no error, the judgment is affirmed.

BATSON *v.* HARLOW.

4-8909 221 S. W. 2d 17

Opinion delivered June 6, 1949.

Carlos B. Hill and *J. S. Jameson,* for appellant.

Rex W. Perkins and *G. T. Sullins,* for appellee.

MINOR W. MILLWEE, Justice. Appellants and appellees own and reside on adjoining residential lots in the City of Fayetteville. Appellants' lot lies immediately north of the lot of appellee and each of the lots is described in the respective deeds of the parties as being 50 feet wide and 194 feet long facing west on Hill Street.

In July, 1948, appellants, without notice to appellee, caused a survey to be made of their property. According to the survey a driveway used by appellee to enter his garage from Hill Street encroached about 4½ or 5 feet upon appellants' lot. Appellant began construction of a rock wall along the west end of the line established by the survey and appellee instituted this suit to enjoin construction of the wall and to quiet title to the driveway which he alleged had been acquired by adverse possession and by an agreed boundary through recognition by the parties and their predecessors in title for a period much longer than seven years.

Appellants' answer denied the allegations of the complaint and asserted that appellee's use of the driveway was permissive. The answer also prayed that a temporary restraining order issued by the court be dissolved and for damages in the sum of $500. Trial resulted in a decree for appellee and the temporary restraining order was made permanent. The court found that a fence between appellee's lot and the adjacent owner on the south had been recognized for many years as the true line between the two properties and that appellee and his predecessor in title had held adverse possession of a parcel extending 50 feet north from said fence and including the driveway in question for more than seven years; that adjoining owners for a long number of years had acquiesced in a boundary line between the lots of appellants and appellee marked by the north line of appellee's driveway; and that appellee was entitled to the free and unobstructed use of said driveway.

Appellants question the sufficiency of the evidence to sustain the decree and contend that appellee failed

to meet the burden of proof required to establish either an easement by adverse possession or an agreed boundary line between the properties.

The parties purchased their lots in 1945. Prior to that time the houses on said lots had been occupied for many years by tenants of the respective owners. The evidence on behalf of appellee discloses that there is a garage and driveway on the north side of appellee's lot and also on the north side of appellants' lot used by each owner of the respective lots or their tenants for more than seven years. W. M. Armstrong owned the lot now owned by appellee for at least 15 years prior to 1936. His widow testified that those residing on the property had used the driveway for the past 26 years and that she and her husband claimed ownership of the driveway. Other neighbors testified to the continued use of the driveway by tenants residing on the lot prior to appellee's purchase in 1945.

Appellee and his wife lived on the lot now owned by appellants from 1942 until the purchase of their lot in 1945, during which time they used the garage and driveway north of the house now owned by appellants while tenants residing on the lot now owned by appellee used the driveway in controversy in this suit. Entrances to the driveways on both lots were cut in the Hill Street concrete pavement or curb about 18 or 20 years ago.

The surveyor who ran the lines for appellants stated that the driveway leading to appellee's garage encroached on appellants' property about 4½ or 5 feet according to the survey. On cross-examination he stated that he checked the true line with reference to two or three old fences in the block and found that the true line would run about five feet south of each fence. One of these is a rock fence which has been recognized as the division line between appellee's lot and the adjacent lot to the south for 30 or 40 years. The effect of his testimony is that, if property lines are adjusted according to the survey, each of the property owners on the west side of the block would be obliged to establish a new line five feet south of the line that has been recognized by the several owners for a long number of years.

The real estate dealer who handled the sale of the lot to appellants stated that he pointed out the lines substantially as established by the survey on information from a former tenant. Appellants testified that they had maintained joint use of the driveway in question since they purchased their lot and that appellee had made statements acknowledging their ownership of the driveway. Appellee denied making such statements and also denied joint use of the driveway.

Appellant Joe Batson testified that he did not claim the driveway north of his house because the survey showed that it belonged to the adjacent owner on the north. He relied on representations made by the real estate agent and did not inquire of the owners or their tenants as to location of the division line.

Appellee and two neighbors made measurements from the old fence dividing appellee's lot and the adjacent lot on the south. According to these measurements all property owners in the west half of the block have the proper amount of land under the court's decree except appellants, who are short about eight inches. The evidence as to these measurements is corroborated by the testimony of the surveyor who ran the lines for appellants.

We have held in a number of cases that where the defendant establishes record title to land in controversy, the burden rests on the plaintiff to sustain his claim of adverse possession by a preponderance of the evidence. Assuming that the survey made in the instant case established record title to a part of the disputed driveway in appellants, we think appellee has met the burden by showing adverse possession and use of the driveway by him and his predecessors in title for more than seven years. The greater weight of the evidence also supports the conclusion that the owners of the two lots and their tenants have established the division line as claimed by appellee by acquiescence and occupation according to such line for many years. An agreement to establish such line may be inferred from such long-continued occupation and acquiescence. Deidrich v.

Simmons, 75 Ark. 400, 87 S. W. 649; Gregory, et al. v. Jones, 212 Ark. 443, 206 S. W. 2d 18.

Appellants insist that possession and use of the driveway by appellee and his predecessors in title were permissive under the rule announced in Boullioun v. Constantine, 186 Ark. 625, 54 S. W. 2d 986, where it was held that use of a way over a stranger's vacant and unenclosed lot was permissive. The lot over which the driveway runs in the instant case is not vacant, but has been occupied and partly enclosed during the years it has been used by the owners and occupants of appellee's lot.

A careful consideration of the testimony leads us to the conclusion that the finding of the chancellor is supported by the preponderance of the evidence. The decree is, therefore, affirmed.

TISDALE *v.* AKERS.

4-8899 221 S. W. 2d 19

Opinion delivered June 6, 1949.

Sullins & Perkins, Lee Seamster and *Mark E. Woolsey,* for appellant.

John W. Cloer and *Greenhaw & Greenhaw,* for appellee.

ED. F. MCFADDIN, Justice. In this suit on a promissory note, the primary question is whether the Chancery Court correctly evaluated the evidence on the issue of *payment;* and the secondary question is the *rate of interest.*

On May 23, 1947, Miss Jean Mullen, for value received, executed to James Akers (plaintiff below and appellee here) her promissory note for $2,000, payable $350 on May 27th, and $200 on the 27th day of every month thereafter until paid in full; and as a part of the transaction, and to secure the payment of the note, Jean Mullen executed to James Akers a chattel mortgage on all the fixtures and other equipment of the Monarch Cafe, then owned and operated by her in Springdale, Arkansas. She made the payments due in May and June, and then sold the cafe to Mrs. Edith Tisdale (defendant below and appellant here), who assumed the balance due on the Akers note, and made one payment of $200.

On January 30, 1948, Akers filed this suit, seeking judgment for the alleged balance of $1,250 due on the note, and for foreclosure of the chattel mortgage. Mrs. Tisdale resisted the suit, and claimed that she had paid the note in full. After extended hearings, the Chancery Court rendered judgment for Akers for the $1,250, together with interest at 8% thereon, and for foreclosure of the chattel mortgage. To reverse that decree, Mrs. Tisdale brings this appeal in which she argues (1) the issue of payment and (2) the rate of interest. We consider these points.

I. *Payment.* The burden of proving payment is on the person alleging it.[1] To meet that burden, Mrs. Tisdale—among other things—not only (a) exhibited the Mullen note in her possession (which makes a *prima*

[1] Smith v. Taylor, 144 Ark. 569, 222 S. W. 1062; Blass v. Lawhorn, 64 Ark. 466, 42 S. W. 1068; and see cases collected in West's Arkansas Digest, "Bills and Notes", § 499, and "Payment", § 65(6).

facie case for payment),[2] but also (b) testified that she personally paid Akers by delivering to him one $1,000 bill, two $100 bills and one $50 bill, which currency she testified she had in her safe deposit box in a bank in Fayetteville.

To rebut the presumption of payment, and to prove that the note had not been paid, Akers and his agent, Mitchell, testified: that Mrs. Tisdale wanted to make a new note to Akers for $1,250 payable at $100 per month, instead of $200 per month; that Akers (whose place of business was in Harrison) prepared the new note and sent it along with the old note to Mitchell in Springdale, with instructions to deliver the old note to Mrs. Tisdale when she signed the new note; that Mrs. Tisdale insisted on seeing the old note; that Mitchell, in violation of Akers' instructions, left the old note with Mrs. Tisdale without getting the new note; that Mrs. Tisdale thereafter refused to return either note; and that she never paid the balance of $1,250 due on the old note.

Each side offered supporting witnesses. The testimoney is in irreconcilable conflict; and it would serve no useful purpose to summarize the testimony of each witness. After reviewing the entire record, we cannot reach the conclusion that the finding of the Chancellor is against the preponderance of the evidence. All of the witnesses testified in open court, with the exception of Jean Mullen, who testified by deposition. What we said in Murphy v. Osborn, 211 Ark. 319, 200 S. W. 2d 517 is especially applicable to this case:

"The chancellor observed the demeanor on the witness stand, the inflection in the voice and the hesitancy or rapidity of the words flowing from the mouth of the witness. The chancellor thus had an opportunity to see more than the mere words on the printed page which, alone, come to this court. With the testimony in this case in hopeless conflict, we cannot say that the Chancery Court decided against the preponderance of the evidence."

[2] Rose v. Rose, 184 Ark. 430, 42 S. W. 2d 567; Continental Gin Co. v. Benton, 104 Ark. 367, 149 S. W. 528; Hollenberg v. Lane, 47 Ark. 394, 1 S. W. 687.

We affirm that portion of the decree relating to the issue of payment.

II. *The Rate of Interest.* The note executed by Jean Mullen to Akers said, regarding interest: "With interest at ..... percent. per annum from date until paid"; and the mortgage also failed to state the interest rate. Notwithstanding the fact that the rate of interest was left blank in the note, Akers testified that the contract rate of interest was 8%; and the court allowed recovery at that rate.

We hold that the legal rate of interest is all that can be recovered in this case. The cases as to the authority to fill in the blanks in a negotiable instrument[3] are not applicable here, because the blank was never completed in the case at bar. This is a case in which oral testimony was relied on to prove a contract rate of interest to have been more than 6%; and we have many times held that an agreement to pay interest at a rate exceeding 6% will not be enforced unless such agreement be in writing.[4] It follows therefore that the interest must be computed at 6% from the date of the note.

Conclusion: The decree of the chancery court is affirmed in all things, except as to the rate of interest. The cause is remanded for further proceedings, and all costs of this appeal are taxed against the appellant.

EQUITY MUTUAL INSURANCE COMPANY *v.* MERRILL.

4-8914 221 S. W. 2d 2

Opinion delivered June 6, 1949.

[3] For the provisions of the Negotiable Instruments Law, see § 68-114 Ark. Stats. of 1947 and § 10172 Pope's Digest. See, also, Brannan's Negotiable Instruments Law, 4th Ed., § 14.

[4] See Johnson v. Hull, 57 Ark. 550, 22 S. W. 176; Temple v. Hamilton, 178 Ark. 355, 11 S. W. 2d 465; Hamner v. Starling, 185 Ark. 948, 50 S. W. 2d 615.

Willis & Walker, for appellant.

Woody Murray and *H. G. Leathers,* for appellee.

George Rose Smith, J. This suit was brought by the appellee upon an insurance policy covering loss or damage resulting from the theft of his truck. The main question at the trial was whether the vehicle was stolen or merely taken without appellee's permission. The jury found that a theft had occurred.

Appellee lived on a farm about eight miles north of Green Forest and had an employee, Cecil Stewart, who occupied a tenant house. Stewart was authorized to use the truck for farm purposes but was not allowed to use it in his own affairs. On two occasions during the ten days preceding August 2, 1947, the appellee had refused to permit Stewart to take the vehicle on a trip to the wheat harvest. On the night of August 2 Stewart took the truck without permission and drove north into Missouri. He followed a route roughly clockwise and was back in this State driving west toward Green Forest when he was involved in the accident that caused the damage giving rise to this suit. Stewart arranged for the truck to be towed to a garage in Harrison and, leaving it there, returned to his home the next day. There he admitted having taken the truck, attributed it to the fact that he had been drunk, and offered to bear the cost of repairs if appellee wouldn't have him prosecuted. No criminal charges were brought, though in the course of an investigation by the State police appellee reported what he knew of the incident.

This evidence is sufficient to support the jury's verdict. They may well have concluded that Stewart took the vehicle with the intention of going to the wheat harvest and that his aimless circle through Missouri was occasioned by his intoxication. When the accident occurred he was traveling west, the direction of the wheat fields as well as of Green Forest. His conduct in having the truck taken to a garage and in returning to his home

does not eliminate the possibility that the taking was felonious.

Appellant complains of two instructions explaining the elements of larceny, but the only objection made is that they were abstract. Even so, there was no prejudice, for we do not see how either instruction could have misled or confused the members of the jury. We have often held that the giving of abstract instructions is not reversible error in these circumstances.

Affirmed.

HALL *v.* STOVER.

4-8853 221 S. W. 2d 41

Opinion delivered June 13, 1949.

Rehearing denied July 4, 1949.

Campbell & Campbell, for appellant.

Curtis L. Ridgway and *Earl J. Lane,* for appellee.

ED. F. MCFADDIN, Justice. This is an action brought by the owner to recover damages alleged to have been caused to his airplane by the negligence of the bailee.

Stover (plaintiff below and appellee here) was engaged in renting airplanes to licensed pilots. Hall (defendant below and appellant here) was a licensed pilot, and rented an airplane from Stover and flew it for about an hour, and damaged the plane in landing it. Stover claimed that Hall was negligent in landing the plane, in that he landed (1) cross wind, (2) cross traffic and (3) in a forward slip. Hall claimed that he was an experienced pilot, and that the damage to the plane was through no fault of his. The case was tried to a jury, and resulted in a verdict for $750 in favor of Stover. Hall has appealed, and urges here the two points now to be discussed.

I. *Sufficiency of the Evidence as to Hall's Negligence.* The parties concede that Hall was a bailee for hire, and that the rights and liabilities of the parties are to be determined by the ordinary rules in such bailment cases.[1] Thus, the burden was on Stover to prove that Hall's negligence was the cause of the damage to the plane.[2]

There was sufficient competent evidence from which the jury could have found—and its verdict reflects that it did find—that the airplane was duly inspected and tested before the trial flight; that Stover had an experienced pilot take Hall on a trial flight; that Hall, having owned and operated a similar airplane, accepted the rented plane as in good condition; that Hall flew for nearly an hour; and that the damage to the plane occurred through Hall's negligence in landing it. On the issue of Hall's negligence, the testimony was directed (a) as to how Hall landed the plane; and (b) as to whether such landing was negligence. We discuss some of this testimony.

[1] In 6 Am. Juris. 25, in discussing bailment of aircraft, this appears: "The general rules of bailment apply to aircraft."

[2] James v. Orrell, 68 Ark. 284, 57 S. W. 931, 82 A. S. R. 293; Bertig v. Norman, 101 Ark. 75, 141 S. W. 201, Ann. Cas. 1913D, 943; Scott v. Columbia Compress Co., 157 Ark. 521, 249 S. W. 13.

(a) On the first point, William Benson testified that he was flying over the field and observed Hall's landing. Using a small plane to demonstrate before the jury, Benson testified of Hall's landing:

"Q. Assuming this is the runway which he was coming in on, explain and show to the jury what you mean by him going into a slip, and how he landed. A. He slipped to the right and the plane was in this position, and he came in and struck the ground this way, which would make it do that. He was coming in a slip instead of straight ahead. He slipped the plane, and kept it in that position until he hit the ground. Q. Then what happened? A. He bounced then on the ground until it came to a stand-still, and turned after it stopped—not after it stopped: that was the way it finally came to a standstill. Q. Were you flying above him at this time when you were observing him A. Yes. I was six hundred feet high in the traffic pattern.. Q. About six hundred feet high? A. Yes. Q. Did he land in the proper runway: that is, the line where the lane of traffic was going? A. No, he was landing on the cross-runway. Q. From what direction was the wind coming at that time? A. Approximately northwest. Q. Then the landing should have been in the southeast-northwest runway? A. That is right. Q. And what runway did he land on? A. He landed northeast. Q. Northeast-southwest? A. Yes. Headed northeast."

Again, Benson testified:

"Q. Can you tell the jury just what happened when he approached this northeast-southwest runway? A. It looked like he was too high to make the landing, so as he approached the field he put the plane in a slip—that kills your speed and you lose altitude—to bring him down closer to the field so he would be able to land down on this strip. Q. Did he ever straighten the plane out of the slip before his wheels touched the runway? A. Not that I could tell at all. It looked as though the plane remained in the slip until it touched the ground. Q. I believe you stated the plane kept bumping sideways. Yes. Q. Did you observe that? A. Yes, it bounced along

on the runway, or along on the ground, until it came to a stop."

(b) On the second point—i. e., as to whether such landing was negligence—Paul Angell, who qualified as an expert, testified:

"Q. Now, Mr. Angell, you heard the testimony of Mr. Benson as to how the defendant landed the plane on that particular day, did you not? A. Yes.

. . . . . .

Q. I will ask you, also, would a prudent pilot, who has had experience in flying and who is licensed to fly a plane, in taking off and landing, continue to land his plane on into the runway in a forward slip?

. . . . . .

A. The answer to that will be, definitely no. Q. What would happen if he continued on into the runway? A. He would hit the runway in a side motion. His wheels would be pointed in one direction, his flight path would be in another direction, and would cause what is commonly known as a ground loop, unless otherwise checked."

Hall insisted that the witness Benson could not possibly have seen the occurrences as to which he testified. That, of course, was a matter for the jury to decide in passing on Benson's credibility. Hall also insisted that even though the witness Angell qualified as an expert, nevertheless, he should not have been permitted to testify as he did. But whether the described operations were ordinarily prudent was a question for the jury; and the Court—without objection—instructed the jury: "You are instructed that negligence is the doing of something that a man of ordinary prudence would not do under the same or similar circumstances, or the failure to do something that a man of ordinary prudence would have done under the same or similar circumstances."

It would unduly prolong this opinion to summarize the testimony of all the witnesses, and to explain the terminology used by them. The fact remains that there

was sufficient competent evidence to take the case to the jury on the issue of Hall's negligence, and under our judicial system—in a case such as this—it is for the jury to determine the factual questions.

II. *Instructions.* The trial Court gave six instructions on its own motion, and four others on motion of the defendant; but refused to give eight other instructions requested by the defendant. The appellant has set out in his abstract the complete and exact wording of only one instruction that was given, i. e., the Court's instruction No. 3. All other given instructions are merely summarized. The instruction No. 3 is not inherently erroneous.

On page 146 of C. R. Stevenson's 1948 revision of Arkansas Supreme Court Procedure, the following appears as a fair summary of our holdings on the matter of setting out the instructions in the abstract:

"All instructions must be set out in the abstract and when not set out, errors will not be considered unless the instructions are so inherently defective that they could not be cured by others. Morris v. Raymond, 132 Ark. 449, 201 S. W. 116; Harrelson v. Eureka Springs Elec. Co., 121 Ark. 269, 181 S. W. 922; Barnett Bros. v. Western Assurance Co., 126 Ark. 562, 191 S. W. 226; Forrest City Box Co. v. Latham, 144 Ark. 451, 222 S. W. 706; Crosby v. Lucas, 180 Ark. 277, 20 S. W. 2d 861; Commercial Credit Co. v. Childs, 199 Ark. 1073, 137 S. W. 2d 260, 128 A. L. R. 726; Peoples Loan & Inv. Co., v. Whittle, 205 Ark. 35, 166 S. W. 2d 390; Baker v. Boone, 206 Ark. 823, 177 S. W. 2d 756; Sloan v. Ayres, 209 Ark. 119, 189 S. W. 2d 653.

"Error of the court in refusing an instruction asked will not be considered where appellant's abstract fails to set out the other instructions given by the court. St. L. I. M. & S. R. Co. v. Boyles, 78 Ark. 374, 95 S. W. 783; Keller v. Sawyer, 104 Ark. 375, 149 S. W. 334; DeQueen & East. Ry. Co. v. Thornton, 98 Ark. 61, 135 S. W. 822; Met. Life Ins. Co. v. Shane, 98 Ark. 132, 135 S. W. 836."

Since the only given instruction set out in the abstract (that is, court's instruction No. 3) is not inherently

erroneous, and since all the other instructions as given are not set out in the abstract, we must consider that the appellant has waived his argument as to the instructions.

Affirmed.

GILES *v.* SCOTT.

4-8821 221 S. W. 2d 44

Opinion delivered June 6, 1949.

Rehearing denied July 4, 1949.

Murray O. Reed, Wm. C. Gibson and *W. A. Leach,* for appellant.

George B. Segraves, Jr., A. G. Meehan, Virgil R. Moncrief and *John W. Moncrief,* for appellee.

GRIFFIN SMITH, Chief Justice. Dan Burks died intestate February 27, 1947, owning real and personal property. Helen Scott, representing herself to be a daughter, was granted letters of administration March 4. Jesse Burks, residing in Detroit, was named in the application as the only other heir. On April 3d Lucile Giles petitioned for removal of the administratrix, and asked that the Peoples National Bank of Stuttgart be re-

strained from disbursing any part of $809 the intestate had on deposit. Lucile alleged that Helen was not Dan's daughter, but that she (Lucile) was Dan's only living child. Probate Court enjoined the Bank from disbursing the cash fund; whereupon Helen, by petition with exhibits, asked that certain directions Dan gave shortly before he died be construed as an assignment of the bank balance with joint interest and survivorship.

A great deal of testimony relates to the personal affairs and various marriages of Dan, and like conduct by Helen and Lucile—a summary of which is not important in reaching a decision.

Probate Court refused to resolve the conflict between Lucile and Helen respecting their true relationship to Dan, but "decreed" that Dan had entered into a contract with Helen to leave his property to her. This agreement, said the Court, was based on a valuable consideration, hence Helen was "justly, equitably, and legally" entitled to the net estate.

Effect of this order was to decree specific performance of the contract Helen claimed her father made with her; and, while there was evidence sustaining the contention, the matter was not within Probate jurisdiction. Rights contended for by Helen were essentially equitable, and as such should have been presented to a court of Chancery. Probate Court determines "questions of inheritance" when making orders for distributive interests. *Brackville v. Holt,* 153 Ark. 248, 239 S. W. 1059, 241 S. W. 32.

That part of the order dismissing Lucile's attack on appointment of the administratrix and directing payment of a $30 claim will be affirmed, as will the restraining order directed to the Bank. In other respects the judgment is reversed.

MONTICELLO COTTON MILLS, INC., *v.* POWELL.

4-8910 221 S. W. 2d 33

Opinion delivered June 13, 1949.

Rehearing denied July 4, 1949.

[redacted]

Williamson & Williamson, for appellant.

Jim Merritt and *Louis Watts,* for appellee.

ED. F. MCFADDIN, Justice. John Powell sued Monticello Cotton Mills (hereinafter called Monticello) for damages and also for specific performance of a contract of employment. From the decree allowing damages, Monticello has appealed; and from the decree refusing specific performance, Powell has appealed.

FACTS

Monticello (defendant below and appellant here) is a corporation, and, in the operation of its cotton mill, it

employs a large number of people. John Powell (plaintiff below and appellee here) was an employee of Monticello, being a doffer, as that term is known in cotton mill parlance. In order to provide a lunch and cold drink concession for the convenience of its employees, Monticello constructed a lunch counter in the mill; and the operator thereof also had a wheel cart to be used in carrying the lunch stand commodities through the mill for sale to the employees.

On November 6, 1946, Monticello and Powell entered into a written contract, the portions of which material to this case are as follows:

"1. John Powell agrees to rent from Monticello Cotton Mills, Inc. a certain portion of the main building to be used for a means of supplying the employees of the Monticello Cotton Mills food, drinks, candy and other things to eat.

"2. This agreement shall run for one year from date of signing.

"3. The rent shall be $25 per month payable at the end of each month.

"4. The Monticello Cotton Mills, Inc., agrees to allow John Powell to use the equipment now located in its plant as listed without any charge.

"9. There shall be no sub-leasing by John Powell unless permission is obtained in writing from the Monticello Cotton Mills, Inc.

"10. John Powell shall be subject to any rules and regulations the Monticello Cotton Mills, Inc. shall prescribe for the satisfactory dealings between employees and John Powell.

"11. In case John Powell does not carry out any of the terms of this agreement, he agrees to allow the Monticello Cotton Mills to cancel this agreement by giving him 30 days notice in writing without any recourse on them.

"12. In case John Powell wishes to terminate this agreement for any cause, he shall give the Monticello

Cotton Mills, Inc. 30 days notice in writing of his intention.

"13. It is agreed that John Powell will be given a job as a doffer in the event he terminates this agreement. In case the Monticello Cotton Mills decides he has been guilty of misconduct during the term of this agreement which necessitates the termination of the agreement by the company, then it will be optional with them to give him work."

We will hereinafter refer to the lunch and cold drink stand and the wheel cart, etc., as "the concession." On Monday morning, December 2, 1946, Powell was unable to operate the concession because of his intoxication. He was an alcoholic, and at regular intervals would go on a drinking spree of several weeks' duration. As to his condition the first week in December, 1946, Powell testified that he had been drinking over the weekend; that when he reported at the concession Monday morning Mr. Taylor, the general superintendent of Monticello, told him: "It was reported that you were drunk last night, and are drinking this morning. Let your wife or some of the help run the joint."

Powell's testimony continues:

"I was used to taking orders, and I said, 'If you think it is best, I will.' So, I told my cook to take over and take care of the receipts. My wife comes in at eleven or twelve. Well, then I kinder got tight that evening.

. . . . . .

Q. That was Monday? A. Yes, sir. Q. Did you go back to work on Tuesday? A. I was back there Tuesday morning. Q. Did you start to work? A. I loaded my box, moved it to the same position and Mr. Taylor came in three minutes to eight and said, 'Come into my office.' I followed him in and he said, 'You were drinking again last night and this morning.' I said, 'I was last night, but I was off the job.' He said, 'You better lay off again today.' I said, 'I am not drunk.' And he said, 'I think it best.' So, I pushed the box back toward the door and told my cook they laid me off and asked,

'Where are the receipts from yesterday? She said, I don't know.' Q. Did you go back to work Wednesday? A. Yes, sir. Q. What time? A. Six-thirty or fifteen to seven. Q. What preparation did you make for that day? A. Same thing, loaded my box and moved to the same spot. Q. What happened? A. I met Mr. Taylor, and he said, 'You are drinking and you will have to lay off.' I protested a little. I said, 'Somebody is breaking me. I have no receipts from yesterday.' He said, 'Lay off until dinner, I can smell it on you', and I said, 'You can drink at night and the next morning you can smell it.' I was about half mad then and did drink some more.''

By other witnesses it was shown that Mrs. Powell locked him in his room at the hotel one night because of his intoxicated condition; that he spent Tuesday night, December 3rd in jail, and that he was fined in the mayor's court Wednesday morning for drunkenness; and that he remained intoxicated for some time thereafter. Appellant has a long standing rule against intoxication of employees, which rule appears to have been regularly enforced; any employee coming into the mill in an intoxicated condition is summarily discharged and is not entitled to be re-employed. In keeping with this rule, on Wednesday or Thursday (December 4th or 5th), Mr. Taylor, the superintendent of Monticello told Powell that he would not longer be allowed to come to the mill.

So, on Friday, December 6th, Powell and his wife, at the suggestion of Mr. Thomas, the general manager of Monticello, sold the concession to Will Lane for $194. Powell and his wife were involved in domestic difficulties due to Powell's alcoholism, and each was represented by an attorney. Powell and his wife and their attorneys met at the office of Mrs. Powell's attorney on December 6th, and divided the proceeds received from the sale of the concession. Mrs. Powell filed suit for divorce on the grounds of indignities and habitual drunkenness; and obtained a divorce on January 20, 1947.

The exact whereabouts and conduct of Powell from December 6, 1946, to January 20, 1947, are not clearly

shown; but on the last-mentioned date Powell made formal application to Monticello for employment. This application was by a letter of that date, reading in part:

"On or about November, 1946, I made and entered into an agreement in writing with the Monticello Cotton Mills, Inc. by O. S. Thomas, wherein it was agreed that I was to rent from the Monticello Cotton Mills, Inc. a certain portion of the main building to be used for a means of supplying the employees of the Monticello Cotton Mills food, drinks, candy and other things to eat. Under this agreement I began on or about November 6, 1946, to conduct the business above mentioned under the name of 'Monticello Cotton Mills Sandwich Shop.' On or about December 6, 1946, I was forced to discontinue said operations. This agreement above referred to was terminated. Under section 13 of this contract above mentioned it states, 'It is agreed that John Powell will be given a job as a doffer in event he terminates this agreement.' There follow certain statements that are immaterial to this phase of the matter.

"Please consider this written request as evidence of my desire to carry out the terms of the section of the contract heretofore referred to. You will recall that on December 16, 1946, and December 18, 1946, I made request to be returned to work. In view of the provision above referred to, I am also making formal demand for wages that would have been received by me during this period had the contract been carried out. I am now ready and willing to carry out the terms of the contract by reporting to work as a doffer at the Monticello Cotton Mills, when you call me. You may call me at 308, Monticello, Arkansas, by telephone, or by letter to East College Avenue, Monticello, Arkansas.

"If nothing is heard from you within seven days it will be considered that you do not care to comply with the terms of the agreement above referred to and proper action will be taken to require a specific performance thereof. . . . . ."

When Monticello refused to re-employ Powell, he filed this suit on April 30, 1947, praying:

"Wherefore premises considered plaintiff prays that the Court make and enter an order requiring the defendant to carry out the terms and provisions of section thirteen of the contract herein and return this plaintiff to work as a doffer in said cotton mill and to pay him the sum of $516.80 for loss of wages. . . . . ."

A trial resulted in the decree awarding Powell damages in the sum of $489.60 for net loss of employment from December 28, 1946, to July 26, 1947, but denying Powell's prayer for specific performance of the contract of employment. Monticello has appealed from the money judgment against it, and Powell has appealed from the decree refusing him specific performance of the contract of employment.

OPINION

Able briefs have been filed, arguing many questions, but we find it necessary to consider only Powell's claim for damages. Powell insists that he—and not Monticello—terminated the concession contract; that both sides waived the 30-day notice of termination as contained in sections 11 and 12; and that when he terminated the concession contract he was entitled to be re-employed as a doffer under section 13 of the contract. Monticello contends, *inter alia*: that, regardless of who terminated the contract, the intoxication of Powell was cause for discharge; that Monticello, under section 13 of the contract, decided that Powell was guilty of misconduct, and that, since he was not entitled to re-employment, he was not entitled to recover damages.

Assuming—but not deciding—that section 13 of the contract was sufficiently definite to constitute an enforceable contract of employment;[1] and again assumbeing in the mill intoxicated or under the influence of ing—but not deciding—that the damages could be assessed without such judgment being contrary to our

[1] For cases holding contracts of employment to be indefinite, and therefore unenforceable, see St. L. I. M. & S. Ry. v. Matthews, 64 Ark. 398, 42 S. W. 902, 39 L. R. A. 467; Fulkerson v. Western Union Tel. Co., 110 Ark. 144, 161 S. W. 168, Am. Cas. 1915 D, 221; Ashley Ry Co. v. Baggott, et al., 125 Ark. 1, 187 S. W. 649.

holdings in similar cases,[2] neverthless, we agree with Monticello that under the facts in this case Powell's intoxication defeats his recovery. This conclusion renders moot all of Powell's claim for specific performance of the alleged contract of employment.

J. H. Scogin testified that in 1946 he was president of the Local Labor Union, with which Monticello bargained collectively, and that the Union approved the rule of Monticello concerning intoxication. This is his testimony:

"Q. Do you know what the rules of the Monticello Cotton Mills, Inc. are in regard to people being in the mill in an intoxicated condition? A. Yes, sir. Q. What are they? A. Give them their time. Q. What do you mean? A. Fire them, lay them off, get them out of the mill. Q. Does that apply to people not employed in the mill, as well as employees, to get them out of the mill? A. Yes, sir, that is a dangerous thing. Q. But if a man is an employee of the mill and intoxicated in the mill, what is the rule? A. They discharge him. Take him out of the mill. . . . . ."

F. W. Stone testified that he was a mechanic at Monticello's mill:

"Q. Mr. Stone, are you familiar with the rules of the Monticello Cotton Mills, Inc. in regard to persons being in the mills intoxicated or under the influence of liquor? A. Yes, sir. Q. What are those rules? A. Discharge. Q. Will you amplify that? I know what you mean, and I guess the Court will know. What do you mean by that? A. They are fired. They don't work there any more. Q. If they come into the mill that way? A. Yes. Q. Is that rule well understood among the employees, or not? A. Yes, sir."

The necessity for this rule is shown in the testimony of T. P. Taylor, the superintendent of the mill and next

[2] For a case in which we refused to assess damages in a contract for personal service, see Petty v. Mo. & Ark. Ry. Co., 205 Ark. 990, 167 S. W. 2d 895, in which certiorari was denied by the U. S. Supreme Court, 320 U. S. 738, 64 S. Ct. 37, 88 Law Ed. 437. Also, on the same point, see 12 Am. Juris. 860 and annotation in 35 A. L. R. 1432.

in authority to A. S. Thomas, vice-president and resident manager. Here is Taylor's testimony:

"Q. What effect, if any, does it have on the safety of persons in the mill when a person is in the mill in an intoxicated condition? A. It is dangerous. He is liable to fall in a machine and get badly hurt or liable to get in an argument with any of the employees, and we do not have them in the mill when we know it. Q. Is there, or is there not a great deal of rapidly moving machinery in a cotton mill of this kind, particularly the Monticello Cotton Mills? A. Yes, sir, lots of it. Q. Are the passag - ways between these rapidly moving machines broad or rather narrow? A. Well, they are broad enough for a sober man to walk in, but not for a man under the influence of liquor. Q. What, then, is the rule of the Monticello Cotton Mills, Inc. in regard to persons being in the mill in an intoxicated condition? A. The rule for that is that any man drinking in the mill or under the inflence of whiskey in the mill is to be discharged.

. . . . . .

Q. Please state whether or not that rule is well known to the employees of your mill and persons associated with the mill from day to day? A. Yes."

Powell recognized that this rule against intoxication was binding on him as the operator of the concession, because, on each of the mornings as heretofore mentioned (i. e., Monday, Tuesday and Wednesday) when he reported at the concession showing the effects of intoxication, he obeyed the order to leave the premises. Furthermore, he sold the concession after Taylor informed him that he could not operate it any longer. It is clear that Powell's intoxication caused the termination of the contract, even though Powell never paid the $25 monthly rental for November.

Powell insists that Monticello did not terminate the contract, and that he must be re-employed under that part of section 13 of the contract which reads: "It is agreed that John Powell will be given a job as a doffer in the event he terminates this agreement."

But, in urging that sentence, Powell overlooks the remainder of section 13, which reads: "In case the Monticello Cotton Mill decides he has been guilty of misconduct during the term of this agreement which necessitates the termination of the agreement by the company, then it will be optional with them to give him work."

The preponderance of the evidence shows that Monticello, on Wednesday, December 4th, did decide that Powell had been guilty of misconduct, and did so notify him. Monticello's act, in informing Powell, that due to his intoxication he would no longer be tolerated on the premises, was certainly tantamount to a termination of the agreement by Monticello. After such notice, Powell sold the concession to Lane, with the consent of Monticello; and in making that sale both Powell and Monticello waived the 30-day notice of termination, as contained in sections 11 and 12 of the contract. But the factor that caused the sale of the concession by Powell was Monticello's notice to him that he would not be tolerated on the premises, which was certainly a "termination" of his right to operate the concession.

Powell made no request for re-employment when he sold the concession on December 6th. In fact, he fixes his first request for re-employment as being on December 16, when he claims he had a conversation with Thomas. But Thomas says that on the occasion when he met him in a cafe, Powell was then partially intoxicated and so admitted to Thomas. Thus, Powell's intoxication continuing after December 6th would have been cause in itself to discharge him had he been re-employed, and was cause to refuse to re-employ him. There is nothing in the record indicating that Monticello has been arbitrary in exercising its right under section 13 of the contract to refuse to re-employ Powell. On the contrary, we are convinced that Powell's alcoholic affliction caused him to be guilty of such misconduct that Monticello has reasonably exercised its option as contained in section 13.

CONCLUSION

The judgment in favor of Powell for damages is reversed, and the entire cause of action is dismissed.

QUALITY EXCELSIOR COAL COMPANY *v.* MAESTRI.

4-8876 221 S. W. 2d 38

Opinion delivered June 13, 1949.

Harper, Harper & Young, for appellant.

Grant & Rose, for appellee.

FRANK G. SMITH, J. This is an appeal from a judgment of the Sebastian Circuit Court, Greenwood District, affirming an order of the Arkansas Workmen's compensation Commission, awarding maximum compensation to Mrs. Alice Maestri, widow of Fermino Earnest Maestri, who died September 29, 1947, while working for the Quality Excelsior Coal Company, appellant herein.

The findings of fact made by the Commission, which are supported by the preponderance of the evidence, if not by the undisputed evidence, are as follows.

"The evidence before us establishes that in all probability this deceased had a pre-existing diseased heart condition of which he had complained for some time, but had particularly complained in the last few days of his life and for which he had seen his family physician just two days before his death. The evidence also establishes

the fact that on the morning of September 29, 1947, between the hours of about 8:30 to 10:00, the deceased had engaged in work as a coal breaker which is testified to as being hard manual labor and the work was performed in a place which placed the deceased in a cramped and confined position. The evidence is that he complained of this labor and the effect it had on him and was unable to finish the work because of his physical condition. There is evidence that upon leaving this work, he traversed an entry where the air was bad before collapsing and dying in the arms of George Quillman at 10:30 a. m. according to some witnesses and 10:00 a. m. by others.

"The evidence is clear and undisputed, however, that immediately after he complained he was unable to continue breaking coal, he proceeded down the entry to the point where he died, only a few minutes elapsing between his stopping work and his death.

"We are of the opinion that the decided weight of the medical evidence is that labor such as was performed by the deceased between approximately 8:30 a. m. and 10:00 a. m. put a greater strain upon his already diseased and weakened heart than it could stand, thereby aggravating the pre-existing diseased condition of his heart and hastening death. The claimant is not required to establish proof of the cause of the death to a mathematical certainty, but when the probable cause of death is established to a reasonable certainty, the burden of proof has been discharged.

"We are of the opinion that the claimant has reasonably established the probable cause of the death of Fermino Earnest Maestri on September 29, 1947, to have been an aggravation of a pre-existing diseased heart condition arising out of and in the course of his employment with the respondent employer."

Upon these findings the Commission made the award which was affirmed on appeal to the Circuit Court, and from the judgment of the Circuit Court is this appeal.

For the reversal of this judgment it is stated in appellant's brief that the evidence upon which the Com-

mission awarded maximum compensation was virtually undisputed, but that the Commission, and later the Circuit Court, based their findings and award upon conclusions which cannot properly be drawn from the undisputed evidence.

It is undisputed that for an indefinate time, but for a long period of time, the deceased was affected with a heart ailment, which according to the testimony of the physician testifying in the case, would eventually have caused his death, if he had not previously died from some other cause. His family physician had advised him to discontinue his work, and to remain at home, but he disregarded this advice.

Deceased was the foreman at the mine where he was employed, and when he reported there for duty on the morning of the day of his death, he found that they were short a necessary man, and he undertook to fill the place of the man who had failed to report to work. The work which the deceased undertook to do was performed while he was in a cramped position, breaking and loading coal, and after working for about an hour and a half he became exhausted and quit this heavy labor. He told the man with whom he was working, called his Buddy, that he just could not go on any further, and he started to another part of the mine to give orders there, but on his way he fell and became unconscious and died in about fifteen minutes.

The Commission announced conclusions of law conforming to numerous decisions of this court, the most recent of which is the case of Frank Lyon Co. v. Scott, *ante,* p. 274, 220 S. W. 2d 128. There Scott, the employee, had a congenital weakness in certain blood vessels, and it was established that a hemorrhage would have occurred eventually in any event, even while he was in bed asleep. Scott, the employee, was carrying a heavy kit of tools up a flight of stairs when he collapsed on account of the weakened condition of his blood vessels. We there said: "This testimony brings the case within our holding that compensation is payable when the employee's work so affects an existing condition that injury or death occurs

sooner than would otherwise have been the case." The case of McGregor & Pickett v. Arrington, 206 Ark. 921, 175 S. W. 2d, 210, which had announced the same holding, was cited.

So here, Maestri's death was precipitated and immediately caused by work which he had just performed in the pursuit of his employment and a compensable case was made.

Judgment affirmed.

BARTON *v.* JORDAN.

4-8858 221 S. W. 2d 21

Opinion delivered June 13, 1949.

Reuben Chenowith, for appellant.

Robt. J. White, for appellee.

HOLT, J. This appeal is from a judgment against appellant, Barton, on a jury's award of $200 in favor of appellee, Jordan, a licensed real estate broker, as commission on the sale of certain farm land.

The material facts were to the following effect: Some time in April, 1948, prior to the 21st of that month, appellant entered into an oral contract with the appellee, a real estate broker, to sell a piece of farm land, which appellant owned, for $3,300, out of which appellee was to receive a commission of $200. Appellee found and introduced to appellant a purchaser, Mr. Carter, whom he showed the property, was satisfied with it, and later, on the 21st of April, purchased the farm direct from the owner, Barton. There was no definite time limit in the contract between appellant and appellee.

On April 21st, after appellant on one or two occasions had made changes in the selling price of the farm, he (appellant) along with the purchaser, Mr. Carter, went to the home of appellee, Jordan, and there it was definitely decided and agreed that Carter was to pay appellant $3,300 for the farm and appellant agreed to pay appellee a commission of $200.

Carter testified that some time prior to the 21st, after appellee had advised him that the Barton farm was for sale, and that he, appellee, was handling it, that "the next day my wife and I went out to look the place over and Mr. and Mrs. Barton were both at home, and we talked to them about it. A price of $3,300 was agreed on. We were satisfied with the place. And with the price."

Immediately following and after some negotiations with reference to a loan to pay part of the purchase money, Carter further testified that he and Jordan went to appellant's farm: "Q. What occured there? A. Barton and I made an agreement to pay Jordan. I made an agreement with Barton to pay him $3,300, and he was to pay the $200 commission. Q. Mr. Barton was to pay Jordan $200 commission? A. Yes, sir. Q. Was that before or after you went out there? A. That was while

we were there. Q. You then agreed on a price of $3,300? A. Yes, sir. Q. And Mr. Barton agreed to pay Jordan $200 of that? A. Yes, sir."

Immediately following this meeting, on the same day (the 21st), appellant and Carter left appellant's home with the understanding that they were to meet Jordan in Russellville for the purpose of financing and completing the loan, but instead appellant and Carter went to Morrilton, and in the absence of appellee, and without his knowledge or consent, appellant voluntarily reduced the price of the land to $3,000 and sold it to Carter for that amount after Carter had arranged for the purchase money from his brother-in-law. The record reflects that the first information appellee had of the change in the selling price, after the agreement, supra, was given to him over the phone by the purchaser, Carter, after the deal had been consummated.

Under these circumstances, appellee was the procuring cause of the sale, had earned, and was entitled to his commission, as the jury found under proper instructions from the court.

We have many times announced the controlling rule in circumstances such as are presented here. In *Stiewel* v. *Lally,* 89 Ark. 195, 115 S. W. 1134, we said: "When appellant accepted the fruits of appellees' services without giving them notice of revocation of their authority, he bound himself to pay the stipulated commission. * * *

"Where the terms of sale are fixed by the vendor, in accordance with which the broker undertakes to produce a purchaser, yet if, upon the procurement of the broker, a purchaser comes, with whom the vendor negotiates, and thereupon voluntarily reduces the price of the property, or the quantity, or otherwise changes the terms of sale, as proposed to the broker, so that a sale is consummated, or terms or conditions are offered which the proposed buyer is ready and willing to accept, in either such case the broker will be entitled to his commission at the rate specified in his agreement with the principal," and in *Hodges* v. *Bayley,* 102 Ark. 200, 143 S. W. 92, we said: "A broker who has been employed

to sell property is entitled to his commission where he has brought about between the principal and another negotiations which resulted in a sale which was consummated by the principal. *Hunton* v. *Marshall,* 76 Ark. 375, 88 S. W. 963. The broker is entitled to his commission in such event, although the principal sold upon terms different from those mentioned to the broker. *Stiewel* v. *Lally,* 89 Ark. 195, 115 S. W. 1134." See, also, *Hight* v. *Marshall,* 124 Ark. 512, 187 S. W. 433.

Based on the above facts and authorities, the court correctly instructed the jury as follows: "You are instructed that if you find from a preponderance of the testimony in the trial of this case, that plaintiff was a licensed realtor as required under the laws of Arkansas, and as such realtor entered into a contract with the defendant as his agent for the securing of a purchaser of defendant's realty, for an agreed commission, and that under such agreement, defendant listed his property with plaintiff as his real estate agent, and that subsequently and while such contract was in force and effect, if it was so made, plaintiff brought to defendant a person or persons as prospective purchasers, who subsequently purchased the property from defendant through such introduction and efforts of the plaintiff, if found so made, then your verdict should be for the plaintiff for the commission though the sale may have in fact been completed by the owner himself.

"No. 4. You are instructed that if you find from a preponderance of the testimony that plaintiff as the agent of defendant, brought a purchaser or purchasers of the realty of defendant, to him, and through an introduction or disclosure of the purchase brought about negotiations through which the sale of the property was effected, then if you so find, the commission alleged to be due would be payable by defendant and if you so find, your verdict should be for the plaintiff."

On appellant's contention that appellee was acting for both the buyer and seller and therefore was not entitled to recover, but little need be said. We find no evidence in the record to sustain this contention.

It appears that appellant made no issue on this contention at the trial and no instruction with reference thereto was asked by appellant.

We held in *Keller* v. *Whittington,* 106 Ark. 525, 153 S. W. 808, that: (Headnote 3) "Where a question was not made an issue in the trial below, and no proof taken directed to it, it is too late to raise the question for the first time on appeal." See, also, *Plummer* v. *Reeves,* 83 Ark. 10, 102 S. W. 376.

Appellant's fourth contention that the court erred in refusing to give his requested instruction No. 1 is untenable. The instruction provided: "You are instructed that if you find that the defendant entered into a contract listing his land with the plaintiff for sale of defendant's land and that said contract, if there were a contract, was for any specified length of time and that plaintiff furnished a buyer able and willing to buy before defendant revoked the contract, your verdict should be for the plaintiff; but you are further instructed that if defendant and plaintiff entered into a contract for plaintiff to sell defendant's land and said contract was not for any specified length of time, defendant had the right before a bargain was made while negotiations were unsuccessful before plaintiff had earned a commission to revoke the contract and the plaintiff cannot thereafter claim a commission on a sale made by defendant even though the sale was made to a customer with whom the plaintiff had negotiated."

The court correctly refused to give this instruction for the reason that the evidence shows that appellant at no time, prior to the date that he alone completed the sale to the purchaser, Carter, for $3,000 cash, revoked, or attempted to revoke, his contract with appellee. Appellee was entitled, under his contract with appellant, to a reasonable time within which to consummate the sale of the property to his prospect, Carter. Here, he was prevented from consummating the sale by appellant's own acts.

We said in *The Addressograph Company* v. *The Office Appliance Company,* 106 Ark. 536, 153 S. W. 804:

"If after a broker, employed to sell property, had in good faith expended money and labor in advertising for and finding a purchaser, and was in the midst of negotiations which were evidently and plainly approaching success, the seller should revoke the authority with the purpose of availing himself of the broker's efforts and avoiding the payment of his commissions, it could not be claimed that the agent had no remedy. In this case it might well be said that there was an implied contract on the part of the principal to allow the agent a reasonable time for performance, that full performance was wrongfully prevented by the principal's own acts, and that the agent had earned his commission."

We conclude, therefore, that on the whole case, the evidence was ample to support the jury's verdict, that no error appears, and accordingly, the judgment is affirmed.

JAMES *v.* JAMES.

4-8917 221 S. W. 2d 766

Opinion delivered June 13, 1949.

Rehearing denied July 4, 1949.

Dinning & Dinning, for appellant.

A. M. Coates, for appellee.

MINOR W. MILLWEE, Justice. Appellant, Freddie James, sued appellee, Claude James, for divorce alleging as grounds therefor general indignities and cruelty. In his answer and cross-complaint appellee denied the allegations of the complaint and charged that appellant had been living in adultery since December 25, 1947. Appellee further alleged in his cross-complaint that when the parties commenced living together in July, 1934, appellant had contracted to purchase Lot 11, Block 65 in the City of West Helena, Arkansas; that he paid a balance still due on the purchase price of the vacant lot and constructed a dwelling house thereon at a cost to him of $1,200 with the understanding and agreement that they would hold said lot as their joint property; that the parties still occupied the property as a homestead although they lived separate and apart; and that after the parties married in 1940, they purchased adjoining Lot 12 as an estate by the entirety. The prayer of appellee's cross-complaint was that he be granted a divorce and adjudged to be the owner of a one-half interest in Lot 12 and that a lien on Lot 11 be adjudged in his favor to the extent of the monies expended by him in the construction of the house; and that said property be ordered sold and the proceeds divided between the parties.

Appellant filed an answer to the cross-complaint in which she denied that appellee had contributed anything toward the purchase price of the lot or the cost of the residence, except a small amount of labor for which he had been duly compensated by occupying the home for several years.

The decree awarded appellant a divorce on the grounds alleged in her complaint and dismissed appellee's cross-complaint for divorce. The court further found that the balance of the purchase price and the construction of the residence on Lot 11 had been paid for by the joint efforts of the parties under an agreement that title would be placed in them jointly; that appellant failed and refused to carry out the agreement and appellee should be vested with one-half interest in said lot; and that said property should be sold and the net proceeds of the sale divided equally between the parties.

Appellant has appealed from that portion of the decree which vests title in appellee to a one-half interest in Lot 11 and orders its sale. Appellee has cross-appealed from that part of the decree which granted a divorce to appellant and denied appellee's cross-complaint for divorce on the ground of adultery.

We first consider the cross-appeal of appellee. The evidence discloses that when the parties commenced living together in July, 1934, appellant had not obtained a divorce from a former husband. Appellant secured the divorce in 1940 and the parties were then married. They continued to live as husband and wife until December 25, 1947, when their marital relations ceased and appellant and her mother have since resided in one part of the house and appellee in another.

Appellee testified that he saw his wife visit the home of Anderson Brown on the night of December 25, 1947, under circumstances tending to substantiate his charge of adultery. Appellant vigorously denied this testimony and a woman who subsequently married Brown testified that she, and not the appellant, was at Brown's home on the night in question; and that she so informed

appellee the next day when he came to her home and told witness that he and appellant had separated over the incident.

The evidence is also insufficient to show that appellant committed adultery with one Moses Riley. Appellant testified that she was doing laundry work for Riley and her visits to his home were explained as being for the purpose of picking up the clothes and collecting the money for her services. A witness for appellee stated he "just happened to be passing by" when he saw appellant in Riley's house about 9:00 p. m. and saw her leave the house about five o'clock the next morning.

Appellant testified that a few months prior to December, 1947, appellee began staying away from home at nights and to drink to excess; that he cursed and abused her and threatened her life with a pistol. The testimony of appellant was corroborated by that of her mother who had resided with the parties since 1935. She testified that she was fond of her son-in-law and that the parties seemed very happy until appellee started staying out at nights; that appellee's representation to appellant that he was working on these occasions was found to be untrue; that appellee would chase appellant with a pistol and witness advised her daughter to stay away from home "to stop him from fussing and worrying my heart to death." Witness had been nearly blind for two years and stated that appellant had tried hard to please her husband, but they had reached the point where neither could "stand each other."

There was other testimony that in October, 1947, appellee spent evenings in the home and company of a certain woman. Appellee did not deny these visits, but stated that he merely procured whiskey for his friend and a woman who lived with her, and that nothing improper took place.

While the evidence discloses that neither of the parties is without fault, appellee was the first and chief offender in their domestic strife. His accusations of infidelity against appellant appear to have been unjus-

tified and his habitual neglect and cruel treatment of her while devoting his time and attention to other women afford sufficient evidence to support that part of the decree which granted her a divorce.

On the direct appeal appellant insists that the testimony is insufficient to sustain the chancellor's finding that appellee had become vested with a one-half interest in Lot 11, which was ordered sold and the proceeds of the sale divided equally between the parties. On this issue appellee testified that appellant still owed a balance of about $60 on the purchase price of the lot in July, 1934, when the parties commenced living together. He stated that he paid this balance under an oral agreement that appellant would have the property deeded to them jointly when she obtained her divorce and the parties were legally married. A home was constructed on the lot through the joint efforts and funds of appellee, appellant and her mother together with the assistance of neighbors. Construction of the house was begun in 1938 and completed in the latter part of 1940.

Appellant denied that appellee paid any of the purchase price of the lot and her testimony is supported by her deed to the property which was executed March 16, 1934, and recites a consideration of $40 fully paid in cash. She also denied the agreement to transfer the title to the parties jointly. It was also shown that the mother of appellant furnished funds which she received from her deceased husband and also money earned from chopping and picking cotton as her contribution toward the erection of the house. Appellee and appellant were both regularly employed and each contributed money and labor to the project.

In support of the trial court's finding appellee insists that Act 340 of 1947 authorized the dissolution of the estate by the entirety which he asserts was created by the oral agreement between the parties. Since we have concluded that the evidence is insufficient to support the court's finding that appellee became vested with title to a one-half interest in Lot 11, we find it unnecessary to pass on the applicability of said act to an en-

tirety estate alleged to have been created prior to passage of the statute.

In the recent case of Simpson v. Thayer, 214 Ark. 566, 217 S. W. 2d 354, we reaffirmed the rule announced in Harbour v. Harbour, 103 Ark. 273, 146 S. W. 867, where the court said: "It has been frequently held that where the husband purchased and paid for lands, taking the deeds therefor in the name of his wife, the presumption is that his money, thus used, was intended as a gift to her, and the law does not imply a promise or obligation on her part to refund the money or to divide the property purchased or to hold the same in trust for him. His conduct is referable to his affection for her and his duty to protect her against want, and it will be presumed to be a gift and, so far as he is concerned, becomes absolutely her property. Wood v. Wood, 100 Ark. 370, 140 S. W. 275; Womack v. Womack, 73 Ark. 281, 83 S. W. 937, 1136; O'Hair v. O'Hair, 76 Ark. 389, 88 S. W. 945." The proof to overcome this presumption of gift should be clear and convincing. Simpson v. Thayer, supra.

It is also well settled that in order to constitute a resulting trust by reason of the payment of purchase money, the payment must be made at the same time or previous to the purchase and must be a part of the transaction. The oral evidence relied on to establish such trust must be full, free and convincing. Brady v. Timms, 162 Ark. 247, 258 S. W. 338; and McKindley v. Humphrey, 204 Ark. 333, 161 S. W. 2d 962. The husband's subsequent improvements, payment of taxes and insurance are all referable to his "natural desire to manage and care for his wife's property" in the absence of clear and convincing evidence to the contrary. Parks v. Parks, 207 Ark. 720, 182 S. W. 2d 470.

Appellee insists that his contention as to the agreement is supported by the fact that title to Lot 12 was taken jointly after marriage of the parties and construction of the house on Lot 11. There is no evidence of any specific demand by appellee that the alleged 1934 oral agreement be carried out when they purchased Lot 12 or at any other time. Appellee gave the following

testimony as to the alleged agreement: "A. The agreement was when we got the lot paid for, she had to get a divorce to marry me and said she would change it and have it in our names . . . Q. Now then did she carry out that agreement? A. She didn't change the deed." Appellant denied the agreement and the evidence refutes appellee's statement that the purchase price had not been paid when they commenced living together.

We conclude that the evidence was insufficient to establish the alleged agreement and that the trial court, therefore, erred in vesting title to a one-half interest in Lot 11 in appellee and ordering its sale and division of the proceeds between the parties. The decree is accordingly reversed on direct appeal and the cause remanded with directions to dismiss the cross-complaint of appellee in so far as it affects the title to said lot 11. In all other respects the decree is affirmed.

ROARK *v.* PUCKETT.

4-8907 221 S. W. 2d 8

Opinion delivered June 13, 1949.

J. Bun Perrymore and *Bland, Kincannon & Bethell,* for appellant.

Hardin, Barton & Shaw, for appellee.

GRIFFIN SMITH, Chief Justice. In his complaint Horace C. Roark alleged that unless an equitable lien

should be declared in his favor on designated property in Fort Smith, Lewis W. and Georgia Schneider as owners would be unjustly enriched by money the plaintiff spent on improvements. The Chancellor found that the claim was without equity.

In November 1947 Roark married Alice Puckett, a widow. Mrs. Puckett was then living in a home owned by the Schneiders, who resided in Oklahoma at Muskogee. Mrs. Schneider is Mrs. Puckett's daughter.

According to the plaintiff's testimony, he expected the bride to go with him to a home he owned three miles from Van Buren, in Crawford County, where he lived with his mother. This did not appeal to Mrs. Roark, who assured him she owned a house in Fort Smith, and that his mother would be welcome as a member of the family group. Without making any investigation regarding title, Roark began a reconditioning program, and says he spent $2,910.48 in betterments.

There is testimony that on several occasions Schneider and his wife went to Fort Smith, and knew the improvements were being made. There is a sharp conflict between Roark and the Schneiders regarding what was said. Lewis Schneider testified he told Roark that he and Georgia bought the place as a home for Mrs. Puckett. Roark had just said he intended to install a septic tank, and he (Schneider) made the comment, "You can put the sink in the front room if that is where [Mrs. Puckett] wants it". While Schneider did not contend that he told Roark in so many words title to the property was not in Mrs. Puckett, "I took it for granted that he knew when he asked me about making changes. I told him it was all right with me, because I bought the place as a home for her".

Mrs. Puckett[1] testified that before any improvements were made she told Roark he would have to make other arrangements to care for his mother, and Roark said, in effect, that it would be all right, and he would go ahead with the work; whereupon the mother was sent

[1] Mrs. Puckett, after marrying and divorcing Roark, married a man named Kersh, and bore that name when this suit was tried.

to Texas to live with a sister. There appears to have been a period of matrimonial transition, for Roark moved back to his Crawford County home and filed suit for divorce. The cause was dismissed when the Chancellor found the evidence insufficient. Within a short time Mrs. Puckett sued for divorce. A paragraph in her complaint reads: "Plaintiff further alleges that there are no property rights outstanding between the respective parties; that she has a home and means of separate maintenance in her own right, and is asking no support from said defendant". In the decree (Roark having entered his appearance) the Court found that there were no property rights to be settled. Roark had borrowed $150 from Lewis Schneider for use in paying construction costs, promising repayment when his crop of strawberries was marketed.

Before domestic difficulties occurred, Roark had caused his Crawford County property to become an estate by the entirety. Roark says that Mrs. Puckett had borrowed the item of $150 from her son-in-law, but he admitted that "we" used the proceeds on the Fort Smith house. At his wife's suggestion he paid $150 to her, the consideration being that Mrs. Puckett would sign papers releasing the Crawford County property.

Roark further testified that when he entered an appearance in the divorce suit, he did not know the Schneiders claimed an interest in the Fort Smith property.

The Chancellor thought a preponderance of the evidence did not show that either of the Schneiders acted fraudulently. We agree that Roark's own carelessness caused his trouble. The slightest investigation would have put him on notice that Mrs. Puckett did not have title. Perhaps he was overconfident in assuming that tranquillity would continue. Be this as it may, he was not justified in thinking that anything the Schneiders did or said was an implied promise to protect him other than as the husband of Mrs. Schneider's mother while the two were in harmonious occupancy of the home.

We are also of the opinion that a duty rested upon Roark, when the divorce suit was filed, to assert his prop-

erty rights; for, as he testified, he did not then know that the Schneiders claimed the residence.

Affirmed.

CAGLE *v.* MONROE.

4-8918 221 S. W. 2d 1

Opinion delivered June 13, 1949.

Dinning & Dinning, for appellant.

A. M. Coates, for appellee.

GEORGE ROSE SMITH, J. This case involves appellant's liability for having set his dogs upon the appellee's cow, which had escaped from her pasture and was trespassing upon appellant's cotton field. There was testimony to the effect that the appellant, discovering this cow and other cattle upon his property, sicked four dogs upon the intruders. One of the dogs was a bulldog estimated by appellee to weigh about eighty pounds. This dog bit the cow so severely that her value as a milch cow was destroyed. The jury awarded compensatory damages in an amount not questioned by appellant.

For reversal appellant contends only that he was entitled to an instructed verdict, as he was not shown

to have had notice of the bulldog's viciousness. He relies upon the familiar rule that the owner of a dog is not liable for harm caused by it unless he has reason to know of the animal's dangerous propensities. But this principle does not reach the point involved here, as appellant is not charged with responsibility for injuries caused by the dog while acting upon its own initiative. Here the bulldog was obeying its master's command. Upon discovering the trespassing cattle the appellant was entitled to use only such force as was reasonably necessary to drive them from his land. *Reinman v. Worley,* 125 Ark. 567, 188 S.W. 1175. Appellee testified that the bulldog was vicious when sicked upon something by the appellant. The injured cow was a gentle and easily managed animal. The jury may well have believed that the appellant exceeded the limits of reasonable necessity in resorting to the use of a pack of dogs, including a large animal of vicious nature when incited to the attack.

Affirmed.

[redacted]

MOTHERSHEAD *v.* DOUGLAS.

4-8904 221 S. W. 2d 424

Opinion delivered June 13, 1949.

Rehearing denied July 4, 1949.

[redacted]

R. W. Tucker, for appellant.

Chas. F. Cole, for appellee.

HOLT, J. Appellant, Mothershead, owns 1,950 shares of stock in the Polk-Southard Mining Company, an Arkansas Corporation, in Batesville, Arkansas. Appellees constitute a majority of the board of directors and stockholders. E. P. Douglas is its president and J. Ray Nuckols, secretary-treasurer.

This corporation acquired certain mining property and equipment from J. R. Davis and assumed a substantial mortgage indebtedness held against the property by the Hendricks Mining & Milling Company, a partnership.

In the latter part of 1947, there was due on this debt to the partnership $45,000, which the Polk-Southard Mining Company was unable to pay. After some negotiations, the Hendricks partnership agreed to accept by way of compromise $15,000 in full settlement of the above debt. To arrange to secure this latter amount, the Board of Directors of the Polk-Southard Mining Company held a meeting January 24, 1948, at which the following action was taken: "January 24, 1948. Present the following Directors; E. P. Douglas; H. C. Hummel; M. L. McNaught; and R. E. Sanders; Moved by Mr. Sanders and seconded by Mr. McNaught that the president and secretary be authorized to sign a note in the amount of $49,000, plus interest at six per cent, payable within sixty days, made payable to Mr. Douglas, Mr. Hummel, Mr. W. E. Shutt, Mr. M. C. Shutt, Mr. J. R. Nuckols, Mr. Bickel, Mr. M. L. McNaught and Mr. C. F. Pennington.

"This note to cover the advance of $4,000 made by these men at an earlier date and the $45,000 mortgage which they took over from Mr. Hendricks in order that Mr. Hendricks could not foreclose. Motion carried."

On this same day, the Polk-Southard Mining Company, by its president, Douglas, and its secretary-treasurer, Nuckols, executed to the appellees for themselves as individuals, its note for $49,000, secured by deed of trust on the property belonging to the Mining Corporation, due 60 days from date, with 6% interest.

April 13, thereafter, appellees, including Douglas and Nuckols, sued the Polk-Southard Mining Company on the $49,000 note and asked that the deed of trust be foreclosed, and on June 1, 1948, decree was entered for $49,000 and sale of the property ordered.

On July 8, 1948, appellant, a stockholder, intervened, denying that the Polk-Southard Mining Company was indebted to appellees in the sum of $49,000, but alleged the actual indebtedness to be $15,000, or less, denied appellees' right to purchase a claim owed by the Corporation, and alleged fraud. His prayer was that the decree be set aside and that the order of sale of the property be withheld pending final determination of the rights of the parties.

Trial on appellant's intervention was had October 7, 1948, which resulted in the dismissal of the intervention for want of equity.

Prior thereto, June 1, 1948, the property was sold under the foreclosure decree for $42,500, and the sale later confirmed.

From undisputed facts presented by this record, appellees, as directors of the Polk-Southard Mining Company, stood in a fiduciary relation to the stockholders of the corporation, were their trustees in handling its affairs and at all times owed the utmost good faith to these shareholders who elected them. They could not, therefore, take advantage of the company's insolvent condition to purchase claims against it for their own personal benefit, contrary to the trust imposed upon them.

The principles of law announced in our own case of *Hornor* v. *New South Oil Mill,* 130 Ark. 551, 197 S. W. 1163, are controlling here. There, speaking through the late Judge Hart, this court said: "A corporation can only act by agents and the directors are the governing body of the corporation. They stand in a fiduciary relation to the corporation and its stockholders. They owe the duty of the utmost good faith toward the corporation and toward the shareholders who elect them. *Nedry* v. *Vaile,* 109 Ark. 584, 160 S. W. 880. * * *

"In Thompson on Corporations, Vol. 2 (2d Ed.), par. 1238, the rule is stated as follows: 'It may be stated as a general rule that a director will not be permitted to purchase claims against the corporation, either when he owes to it the duty of acting in its interests and for its benefits, or when, knowing the corporation to be insolvent, he buys such claims for his own benefit, intending thereby to get an advantage over the other creditors and hold the claims thus purchased against the corporation for their full amount. In all such cases it may be said that the director will have no claim against the corporation beyond the amount actually expended by him. Thus a director acting as a special committee to settle certain claims against the corporation, can not claim for himself the benefit of reductions secured by him in the adjustment and compromise of claims, though purchased by him with his own funds.' "

The evidence is not sufficiently clear, or developed, for this court to determine the correct amount which appellees had expended in satisfaction of the Hendricks partnership debt. Whether they had expended $19,000 as they claim, or only $4,000, as appellant claims, or $15,000, the amount that the Hendricks partnership agreed to take in settlement of the debt, we cannot say, on the record presented.

Accordingly, the decree is reversed and the cause remanded with directions to set the sales aside and ascertain the correct amount expended by appellees and enter a decree in their favor and for further proceedings consistent with this opinion. All costs in both courts to be borne by appellees.

KEARBEY *v.* DOUGLAS.

4-8903 221 S. W. 2d 426

Opinion delivered June 13, 1949.

Rehearing denied July 4, 1949.

R. W. Tucker, for appellant.

Chas. F. Cole, for appellees.

GEORGE ROSE SMITH, J. This appeal is a branch of the case considered in *Mothershead v. Douglas,* also decided today, in which the nature of the proceeding is more fully set forth. In the foreclosure suit below the appellant filed an intervention asserting title to a water pump, a Diesel power unit, a 100-horse-power engine, 1,500 feet of water pipe-line, and several other pieces of equipment. Appellant contends that this property was wrongfully attached to real estate now owned by him and accordingly became a part of the real property. He appeals from the chancellor's refusal to recognize his ownership.

In 1945 appellant bought 225 acres from Peterson and Denison. He later examined the property and found a pipe-line, pump and power unit thereon, which he describes as having been rusty and apparently abandoned. Appellant returned to the land about a year later and observed that additional equipment had been installed. Inquiries revealed that the machinery was owned by Polk Southard Mining Company. After appellant had unsuccessfully attempted to lease to the mining company the property on which the machinery and pipe-line were situated he filed his intervention asserting absolute title to the property.

The mining company and its mortgagees endeavored to prove that appellant's grantors had given an oral license permitting the installation of the equipment. Denison testified that he told a representative of the company that it would be all right to install the machinery and pipe-line, but he admits that Peterson owned the particular tract on which the property is situated. There is some evidence that Denison acted as agent for Peterson in making the sale to appellant, but the record does not support the conclusion that Denison was also Peterson's agent in authorizing the mining company to use the real property. Peterson did not testify, although appellant stated that after the conveyance Peterson said he had not authorized anyone to put anything on the land. Doubtless the chancellor disregarded this hearsay testimony.

It cannot be said that the evidence just summarized supports the view that Peterson gave the mining company permission to use the land. Hence the appellees are in the position of having put their machinery and pipe-line upon another's land without obtaining the owner's consent. If the equipment in fact became part of the real estate the appellant's claim to it must be sustained.

The basic principles observed by the courts in determining whether personal property becomes a fixture by annexation to the land are discussed in *Choate v. Kimball,* 56 Ark. 55, 19 S.W. 108, and Tiffany on Real Prop-

erty (3d Ed.), §§ 606-626. We have held that the intention of the person making the annexation is a consideration of primary importance, *Morgan Utilities, Inc., v. Kansas City Life Ins. Co.*, 183 Ark. 492, 37 S.W. 2d 90; but Tiffany rightly concludes that the courts apply an objective test and arrive at the annexer's intention by looking to his outward acts rather than to the inner workings of his mind. Tiffany, *supra,* § 608. It thus becomes necessary to examine the manifestations of intent that have been regarded as controlling.

One material consideration is the character of the fixture as related to the use to which the land is being put. Tiffany, § 610. In this case the appellees' equipment had no connection with the use of appellant's land. The mining company owned a manganese mine and mill situated at some distance from this land. The pipe-line was laid to supply the mill with water from a bayou in the vicinity, the pumping plant being used to propel the water to the mill. It is not indicated that any mining operations were conducted on appellant's land; it merely lay between the mill and the bayou and had to be crossed to reach the water. Thus this test does not indicate that the chattels became fixtures.

Another consideration of weight is the manner in which the property is attached to the land. Here the pipe-line was not buried in the soil; it was simply laid on the surface. Some of the machinery was of considerable weight, a fly-wheel weighing four tons according to its description in the pleadings, but the testimony is that it could be easily removed without damage to the real estate. One witness testified that at least part of the machinery was bolted to a concrete base and later said that it was "right out there in the open on that rock." Appellant's land is unimproved and of little value except for its cedar timber. The clear preponderance of the evidence indicates that the pipe-line and machinery may be removed without substantial injury to the freehold.

The record leaves us in doubt as to whether the mining company installed its equipment with any idea of

permanency. The pumping plant was twice replaced when it failed to supply the requisite volume of water. It is a fair inference from the record that the property now in controversy was installed with a view to its removal upon the termination of mining operations. We think it unnecessary to review the other aspects of this question. The chancellor found that this particular property is not part of the realty; we think his view is supported by the weight of the evidence. The mining company also built a tool house and a "box house" on the land, but the decree makes no reference to these structures. We assume that the trial court considered them to be fixtures and awarded them to the appellant.

Since the equipment did not become part of the land the remaining question concerns appellees' right to remove it. It has been pointed out that one whose chattels are wrongfully or negligently placed on another's land does not have the privilege of entry to remove them except in an emergency threatening serious injury to the chattels. Rest., Torts, § 200. He should demand the property, and if the owner refuses permission to enter his land there is a conversion for which trover will lie. Waterman on Trespass, § 804. Here the appellant, by asserting title to the property, has in effect refused to permit its removal. Hence the chancellor properly provided in his decree that the appellees might enter the land to retrieve their equipment. This, however, is not a matter of right, and in a somewhat similar situation we have held that the landowner is entitled to nominal damages for the trespass. *Brock v. Smith*, 14 Ark. 431. We accordingly enter judgment in favor of appellant in the sum of $25 and affirm the decree as so modified.

THOMAS AND OZAN LUMBER COMPANY *v.* SMITH.

4-8922 221 S. W. 2d 408

Opinion delivered June 13, 1949.

J. H. Lookadoo and *Thompkins, McKenzie & McRae,* for appellant.

McMillan & McMillan, for appellee.

FRANK G. SMITH, J. Appellant, Ozan Lumber Company, brought this suit in ejectment against appellee, Smith, to recover possession of the E½, section 34, T. 7 S., R. 23 W., lying east of Antoine River, Clark county, containing 270 acres, more or less.

All parties in interest claim title through R. L. Blakeley, who entered into an oral contract with appellee Smith to sell and convey land to the latter. Smith entered into an arrangement with Henry and W. T. Hill, for the location and operation of a small saw mill on the land and Smith had logs cut from the land, sawed into lumber, which was sold to I. B. Thomas. Smith had acquired no title to the land when this lumber was sold to Thomas, and when Blakely was advised of the sale he demanded treble damages from Thomas for the conversion of the lumber. Thomas thought he might be liable, or that he would be sued therefor, and he decided

that the best way out was to buy the land from Blakely and he did so, under an arrangement to this effect: He entered into a contract with the Hills whereby they were to saw the timber on the land into lumber, sell the lumber and deduct $5.00 per 1000 feet to be applied on the purchase price of $1,500 which Thomas had paid Blakely for the land. After $628 had been thus paid, Hill surrendered his contract to Thomas, and moved the mill from the land.

A contract was then entered into between Thomas and Smith whereby it was agreed that Thomas would sell the land to Smith for $1,200 with interest at 8% from July 1, 1944, the date of the contract. Smith had made certain payments to Blakely prior to making this contract with Thomas, but the contract of July 1, 1944, fixed the amount Smith should pay Thomas for the land. The court found that the contract between Thomas and Hill and the contract between Hill and Smith constituted a single transaction and the testimony warrants that finding. Smith did not pay the $1,200 as agreed and that sum was wholly unpaid and past due when the decree was rendered from which is this appeal.

The court found that the defendant, Smith, from time to time thereafter, offered to pay the amount due if Thomas would advise him of that amount. It does not appear why Smith, knowing the amount he agreed to pay, and the date from which the interest thereon should be computed could not by computation have ascertained the amount due, and he has never made tender, but he expressed his ability and willingness to pay at all times when advised of the amount to be paid. Smith does not appear ever at any time to have paid any taxes on the land.

On June 19, 1947, Thomas sold the land in question, with other lands, totaling 5,034.56 acres, to the Ozan Lumber Company, for a consideration of $277,500. It was not shown how the purchase price was arrived at.

This sale made the Ozan Lumber Company the owner of the record title to the land on which it brought

ejectment to recover the land in question of which Smith was in possession. Inasmuch as Thomas had conveyed by warranty deed, he was joined as a party plaintiff. The court found, and the testimony is sufficient to support the finding, that the Ozan Lumber Company was not an innocent purchaser of the land.

Smith filed an answer and cross-complaint in which he alleged possession under a contract of purchase with which he was ready, willing and able to comply. He alleged that Thomas was a trustee for his benefit and that in violation of his duty as trustee, Thomas had conveyed to Ozan Lumber Company land to which he, Smith, was entitled to have a deed upon payment of the agreed purchase money, and the interest thereon.

Smith alleged his election to ratify the sale to Ozan Lumber Company and prayed that he be allowed the same price per acre at which the other land had been sold to the Lumber Company, and that from this amount there be deducted the unpaid purchase price, and that he have judgment for the excess which he alleges was $13,650. He prays this relief upon the theory that Thomas was a Trustee for his benefit, and had wrongfully disposed of trust property thereby giving him the option to ratify the same, which he offered to do, or to sue for the price received for the trust property, which he did not elect to do.

We think no trust relationship was established. The only right Smith has at all is the mere option to buy the land and receive a deed when he has paid the agreed purchase price, with interest thereon, and that right was accorded him in the decree from which is this appeal. This relief was granted upon the theory that Ozan Lumber Company was not an innocent purchaser, but had acquired title subject to Smith's right to demand a deed when he had paid the purchase money.

The decree from which is this appeal was rendered October 19, 1948. It gave Smith until Feb. 20, 1949, or in case of an appeal 60 days from the date of the final adjudication of the case by the Supreme Court, in which

to pay the $1,200 and interest, with the proviso that if not paid, the land be sold in satisfaction of the amount due on the land. The court retained jurisdiction of the cause to render a final decree when the appeal has been disposed of, and will therefore proceed to the execution of the decree which is here affirmed.

The court found that the cost should be taxed against the defendant Smith, because the outcome of this action is to effect the foreclosure of Thomas's equitable title. This being an equity case, the assessment of costs was a matter within the discretion of the court, and we are unable to say that discretion was abused, not only for the reason assigned by the court, but for the additional reason that Smith's delay in demanding a deed and making payment which would have entitled him to a deed precipitated this law suit.

On the whole case we think equity has been accomplished and the decree is in all respects affirmed.

WALKER *v.* STATE.

4560 221 S. W. 2d 402

Opinion delivered June 13, 1949.

Rehearing denied July 4, 1949.

[redacted]

Reinberger & Elibott, Max Smith, and *O. E. Gates,* for appellant.

Ike Murry, Attorney General, and *Arnold Adams,* Assistant Attorney General, for appellee.

GRIFFIN SMITH, Chief Justice. Stanley Jewel Johnson, 21 years of age, died July 5, 1948, from the effect of knife cuts and stabs found by the jury to have been inflicted by Robert Walker. The defendant has appealed from a judgment that he serve 21 years in the penitentiary for second degree murder. The motion for a new trial lists 31 alleged errors, and six are argued.

Primarily, appellant rests his defense upon want of identification. He denies using a knife, although admitting participation in what is spoken of as a "gang fight."

Essential facts were these: Stanley Jewel and his brother Albert, with Dorsey Williams, had started to Mahoney's Ferry on Saline river where they planned to fish. Seven miles north of Rison the highway forms a Y, one branch leading to Pine Bluff, the other to Sheridan. Selman's dance hall, beer joint, and combination grocery faces Highway 79 at the Y. The Johnson brothers and Williams had procured provisions at Pine Bluff, but when they reached the Y one of the three remembered they had neglected to buy bread. For this reason they stopped at Selman's store. There was evidence from which the jury could have found that none had recently touched intoxicants of any kind.

Appellant Walker, 27 years of age, was employed in Pine Bluff, but resided six miles north of Rison. Accom-

panied by Roy Wilson, he drove to Pine Bluff and received a wage payment. The two then drank beer and liquor, and were joined by Carroll West, who is Walker's brother-in-law. They spent some time at West's home, partaking liberally of beer and whiskey, then started the drive that took them to the Y, where Wilson lived. Estelle West, appellant's sister, had joined them.

When the four arrived at the Y, John Dugan and his wife, and Charles Reynolds, were in the beer joint and dance hall. Although some of the testimony is conflicting, and there is an absence of certainty, Dugan, Albert Johnson, Williams, and Appellant Walker were identified as having been in the building. By this time it was getting dark—"good dusk," as one witness said. Wilson procured bottled beer and returned to the car, and was talking with West. Jewell Johnson was in front of West's car when appellant came up. Jewell had just asked how far it was to the river, and whether fishing was good. While Wilson was shaking hands with Jewell, appellant walked close enough to overhear Jewell say his name was Johnson; whereupon, according to Wilson's version of the transaction, appellant turned to Jewell and said, "What did you say your name was?" When Jewell replied, "Johnson", appellant said, "We don't give a damn about the Johnsons", and at the same time struck Jewell with his fist, knocking him down. When Jewell got up appellant knocked him down again, and got on top of him. Williams then went to Jewell's relief, and assisted by Dugan, pulled the assailant off of the prostrate man. Jewell called to his brother and said, "Albert, come here: Walker has cut me". Wilson saw a knife in appellant's hand, and saw him chasing Williams.

Williams had testified that he had been in the building a minute or two when he heard a commotion on the outside. A fight appeared to be in progress. Walker had Jewell down, with his left hand on Jewell's throat. With the aid of "another fellow" (whom he later identified as Dugan) Jewell was relieved. When Walker got to his feet he struck at Williams, but missed; then Williams struck Walker and "staggered" him. When

Walker "came up" he had a knife in his hand. When this testimony was being given, the trial judge said to the witness, "Tell the jury just what you heard and saw". After indicating where he stood and where Jewell and Walker were, Williams replied: "Walker walked up [to Jewell] and struck him with an overhead lick like this—indicating. When he struck Jewell it went just like sticking a knife in a watermelon. If you have ever stuck a knife in an overripe watermelon [you will understand], that is what it went like. I saw the knife in Walker's hand as he came down [with it] and struck Jewell".

Wilson, after describing the fight, testified that he went home with Walker and saw him cleaning blood from a knife. Walker put the knife on the ground and "rolled it" with his foot.

Charles Reynolds, 17 years of age, was cut on an arm and in the back and elsewhere, but did not know who did it. Dugan and Albert Johnson were slightly cut.

Jewell was taken to a hospital, where a physician treated him. Medical testimony was that a knife wound about ten inches in length extended from the upper part of the chest downward. There was also a stab through the chest wall through which a portion of one lung protruded, "and every time he would breathe, both air and blood would escape". Another slash 12 or 13 inches long began under a shoulder and extended to the abdominal wall.

There was other testimony supporting the jury's finding that the assault was made by Walker, hence the plea in respect of identification must be determined against appellant.

The second point argued is that Bertram Wilson was improperly accepted as a juror. The record shows that Wilson had heard discussions regarding the encounter, and on the basis of statements made in these circumstances he had formed an opinion. He could, however, disregard any preconceived beliefs, and would be guided entirely by the evidence. This was sufficient. *Buchanan v. State,* 214 Ark. 835, 218 S. W. 2d 700. Neither was it

shown that the appellant had exhausted his peremptory challenges. *Washington v. State,* 213 Ark. 218, 210 S. W. 2d 307.

When nine jurors had been selected and an additional venire was ordered, the Court directed State Policeman J. V. Rudy to take charge of those selected, after the requisite instructions as to deportment had been given. Rudy was sworn as a special deputy, and served for approximately fifteen minutes. The defense then challenged regularity of the proceedings, took proof of what had been done, and asked for a mistrial. The point was urged that Rudy was a resident of Jefferson County, hence incompetent to serve as an officer in Cleveland County. Section 243 of the Criminal Code, Ark. Stats. (1947) § 43-2121, vests in the trial court a discretion, before a cause is submitted, to allow jurors to separate, "or be kept together in charge of a proper officer." Since the Court had a right to allow the nine jurors to separate, it can hardly be said that discretion was abused when an officer was placed in charge of them and the right to separate was denied. See *Hendrix v. State,* 200 Ark. 973, 141 S. W. 2d 852; *Hyde v. State,* 212 Ark. 612, 206 S. W. 2d 739. In *Albright v. Karston,* 206 Ark. 307, 176 S. W. 2d 421, it was held that in respect of certain duties a State Policeman possesses the power of a Sheriff and may act anywhere in the State. In the case at bar it was not shown that any prejudice attended.

The fourth point argued is that prejudice resulted when the Court permitted Sheriff Morgan to testify regarding the location of lights when he reached Selman's place less than an hour after the cutting occurred. Appellant thinks a proper foundation should have been laid by showing actual conditions when Walker acted. A second objection is that some of the witnesses had testified that the area near the building was too dark to admit of identification. There had, however, been testimony that light came through windows. A complete answer to appellant's objection is that the Sheriff did not undertake to say what the conditions were when the cutting occurred. He only testified to things observed approximately forty-

five minutes after Jewell had been cut. See *Pinson v. State,* 210 Ark. 56, 194 S. W. 2d 190, where it was held that no prejudice resulted to the defendant because witnesses were allowed to testify from rough drawings and photographs, there being no contention that the drawings were accurate, or that they were actual reproductions of the homicide or the area where the shooting was alleged to have occurred. So, here, no one was led to believe that the Sheriff intended to testify that physical conditions he observed were those actually existing when Walker and Jewell clashed.

Allen Templeton, State Policeman with the rank of Lieutenant, had testified that he was in charge of the laboratory at Little Rock, and that "they" brought to him a knife with blood on it, and that "Trooper Rudy" told him it was supposed to belong to Carroll West. West had also been charged with killing Johnson. Templeton said "they" told him it was West's knife, but the blood sample was not sufficient for technicians to determine that it came from a human being. No knife purporting to have been taken from Walker was brought to Templeton. The Court instructed the jury to disregard this testimony, saying: "[This testimony] has nothing to do with the innocence or guilt of the defendant, Walker. In arriving at your verdict you will only consider the evidence that goes to the one question: whether, under the evidence and instructions of the Court, the defendant is guilty." Defendant's counsel remarked, "Note our exceptions. I want you to declare a mistrial." The motion was overruled.

The knife, as an exhibit, was properly excluded for want of identification. What Rudy or someone else may have told Templeton regarding the West knife, or whether in fact it was West's, was not pertinent to Walker's defense. Even if the knife had belonged to West, and the defendant's purpose was to create an inference the particular weapon was used on Jewell, it must be remembered that others were cut the same night.

It is insisted that defendant's requested Instruction No. 3 should have been given. It would have told the

jury that if it entertained a reasonable doubt the defendant was guilty of murder in the first degree, it could convict him of second degree murder, and if doubtful regarding second degree murder, there could be a conviction "for that degree of homicide as to which you entertain no reasonable doubt." An examination of given instructions shows that the subject was fully covered.

Complaint is made of the Court's refusal to give the defendant's requested Instruction No. 5. It would have told the jury that if it "believed from the evidence that more than one person stabbed or cut or wounded the deceased, . . . and you have a reasonable doubt . . . as to whether the defendant cut or stabbed or wounded the deceased, . . . then you are instructed that you cannot convict the defendant of any degree of homicide." Again, the answer is that proper instructions were given, of which complaint is not made. The Court was not required to duplicate its instructions.

Affirmed.

SIMS *v.* HAZEN SCHOOL DISTRICT No. 2.

4-8962 221 S. W. 2d 401

Opinion delivered June 20, 1949.

Rehearing denied July 4, 1949.

John D. Thweatt, for appellant.

Sharp & Sharp, for appellee.

HOLT, J. Appellant, Sims, a resident and taxpayer in Hazen School District No. 2 (Prairie county), for himself and all others similarly situated, filed a complaint in which he alleged, in effect, that appellee, School District, by its Board of Directors, proceeding under Act 161 of the General Assembly of 1949 (Approved February 24), held a special election for the purpose of voting a six mill tax to support a bond issue of $75,000, for new construction, improvement of its present school facilities, and for refunding outstanding bonds which the district owed.

He further alleged that the special election (held April 30, 1949) favored the tax and bond issue by a vote of 33 for, and none against, but that said special election was void and of no effect for the reason that Amendment No. 40 of the Constitution of Arkansas, adopted November 2, 1948, prohibits the holdings of a special election for such purpose, regardless of any legislative enactment.

His prayer was for an order "restraining the defendant, district, from proceeding any further in its effort to execute and deliver the hereinabove described bond issue and to pledge a continuing building fund for its payment," etc.

Appellee filed demurrer, alleging, in effect, that the complaint failed to state a cause of action. The trial court sustained this demurrer, and this appeal followed.

The primary and decisive question presented is: Can the appellee, School District, impose the tax, voted here, to support a bond issue, as alleged, at a special election held for that purpose?

We hold that it cannot for the reason that Amendment No. 40 of our Constitution, adopted November 2, 1948, prohibits the imposition of such a tax unless it has

been approved by a majority vote of the qualified electors of such School District at an annual school election, and not at a special election, as was attempted here.

The General Assembly could not by any provision of Act 161, supra, do anything forbidden by the Constitution. We said in *Hart* v. *Wimberly,* 173 Ark. 1083, 296 S. W. 39: "The act . . . could not have the effect of amending the Constitution, as would be the result if the contention of counsel be correct. The Legislature cannot cure a proceeding made void by the Constitution, and no act that it passes can breathe vitality into a thing that is dead. The Legislature cannot do indirectly a thing directly prohibited by the Constitution."

Such is the effect of our holding in the recent case of *Adams* v. *DeWitt Special School District No. 1,* 214 Ark. 771, 218 S. W. 2d 359.

That decision is controlling here.

In this connection, we may add that we have not overlooked Act 270 of the 1949 General Assembly, (approved March 10th).

Accordingly, the decree is reversed and the cause remanded with directions to overrule appellee's demurrer.

Justice McFaddin concurs.

Ed. F. McFaddin, Justice (Concurring). Even under the holding of this Court in the case of Adams v. DeWitt Special School District, 214 Ark. 771, 218 S. W. 2d 359, I think there could still be a special election in order to determine the views of the voters, as an aid to the school directors in preparing the next annual budget; but such special election would be persuasive rather than legal. Insofar as concerns the issuance of bonds on the authority of a special election, there is no sound distinction between the holding in the case of Adams v. DeWitt Special School District, *supra,* and the holding of the majority in the case at bar.

The purpose of this concurring opinion is to specifically call attention to the fact that—even though I dis-

sented from the majority in the case of Adams v. DeWitt Special School District, *supra*—nevertheless, as a judge, I must accept the decision of the majority in that case as ruling in the case at bar. No finer expression can be found on this matter of subsequent yielding than the language of Mr. Justice BATTLE in Logan v. Eastern Arkansas Land Co., 68 Ark. 248, 57 S. W. 798, in which he followed the holding in an earlier case from which holding he had originally dissented. Here is his language:

"While the rule established in Cooper v. Freeman Lumber Company, 61 Ark. 36, 31 S. W. 981, 32 S. W. 494, does not accord with the views of the writer of this opinion, it is binding upon him as a precedent until it shall be overruled. 'Judges are not expected or required to overturn principles which have been considered and acted upon as correct, thereby disturbing contracts and property, and involving everything in inextricable confusion, simply because some abstract' rule of law has been incorrectly established in the outset."

In keeping with the spirit of the above quotation, I concur with the majority in the case at bar.

McCOURTNEY *v.* ELLINGTON.

4-8913 221 S. W. 2d 410

Opinion delivered June 20, 1949.

Rehearing denied July 4, 1949.

Claude B. Brinton and *Bon McCourtney,* for appellant.

Howard A. Mayes and *H. R. Partlow,* for appellee.

HOLT, J. This is an action of Replevin. March 28, 1947, Crystal Houston sold a Ford automobile to Bill Johnson for a consideration of $350, $150 of which was paid in cash, and the balance, including certain finance and carrying charges, amounting to $288.84, was evidenced by a note and a Conditional Sales Agreement in which it was provided: "That the title of the car shall remain in Seller or Assigns, until all amounts due hereunder or rearrangements thereof are fully paid in cash. Said note or this contract may be assigned or the payment thereof renewed or extended without passing title of said car to Purchaser."

This balance was to be paid in monthly installments of $24.07.

On the same day, March 28th, Houston duly assigned the note and Sales Agreement to the Commercial Credit Corporation.

Johnson made some of the installment payments, reducing the amount to $195.70, and sold the car.

The Commercial Credit Corporation continued to own and hold the note and Sales Agreement until November 25, 1947, when appellees, Ellington and Roe, acquired all rights and interest in these instruments by paying to Mr. Hampton, the authorized agent of the Credit Corporation, $195.70, balance which Bill Johnson owed the Commercial Credit Corporation.

Appellees, used car dealers in Jonesboro, bought the car in question from a party in Kennett, Missouri, without any knowledge of the Credit Corporation's interest and sold it to Mr. Hyde.

Appellant, Sessums, later bought the car and upon learning of the Credit Corporation's lien and interest came back on appellees, who in turn paid the balance due the Credit Company, as above indicated.

At the time appellees paid Hampton, the authorized and acting agent of the Credit Company, Hampton did not have the note and Sales Agreement, but promised and assured appellees that these papers would be deliv-

ered to them shortly, and gave the Credit Corporation's receipt to them. The record reflects that the original note and Sales Agreement had been lost, or misplaced, by Johnson. However, while in his possession, authentic photostatic copies were made and later were delivered to appellees.

Appellees sued Sessums, alleging that the note and Sales Agreement, supra, had been assigned to them by the Credit Corporation, that they were the owners thereof, had title to the car in question and entitled to its possession, that Sessums is a non-resident and about to leave the State, is in possession of the automobile, and refuses to deliver same to appellees. They prayed for recovery of the property and damages.

Appellant, McCourtney, intervened, alleging that on July 21, 1947, Bill Johnson executed a Chattel Mortgage on the car in question to secure an indebtedness of $400 which Johnson owed him for professional services.

Upon trial, at the close of all the testimony, appellants asked for an instructed verdict against appellees, and appellees in turn requested an instructed verdict against appellants.

The court found the issues in favor of appellees. The judgment recited: "And the Court being well and sufficiently advised in the premises, finds for the plaintiffs (appellees) for the possession of one 1937 Tudor Ford Sedan, Serial No. 54-232003, Motor No. 54-232003, as against the Defendant, Ernest Sessums, and the intervener, Bon McCourtney; that the conditional sales contract owned by the plaintiffs is a superior lien to that of the intervener and that plaintiffs are due the sum of $175.90 as a balance upon said sales contract, together with interest at the rate of 10% from 28th of March, 1948, to date.

"The Court further finds that the intervener, Bon McCourtney, has possession of the above named automobile by reason of a lien upon said automobile, junior to that of Ellington & Roe; that he should be permitted to pay the amount due these plaintiffs and retain the

above named car; that the defendant, Ernest Sessums, has received full settlement for any rights which he may have in and to the above described automobile; that the cause of action against J. G. Kelley should be dismissed."

This appeal followed.

There appears to be little, if any, dispute as to the material facts, as above abstracted. Under the provisions of the conditional sales agreement, supra, and the facts presented, the Commercial Credit Corporation held title to secure the unpaid balance on the car in question from the date of the execution of the note and sales agreement until appellees paid this balance due to the agent of the Credit Company. When the Credit Company, through its authorized agent, receipted appellees for this payment,—the balance which Bill Johnson owed on the car,—and promised to deliver the original papers, which it was unable to do for the reason that they were lost or misplaced, but, in fact, did cause to be furnished appellees authentic photostatic copies thereof, an assignment, in effect, of title and all interest of the Credit Company, was consummated in favor of appellees and they acquired the title and interest of the Credit Company in the automobile in question.

Under the topic "Assignments", 6 C. J. S., § 46, p. 1094, the rule is announced in this language: "A parol assignment may be inferred from the conduct of the parties. There must, however, be an appropriation of the debt or fund, and the assignor must confer the complete right or interest in the subject-matter of the assignment on the assignee and surrender all control over it, even if the circumstances do not permit the assignee to take immediate possession thereof."

The judgment of the trial court was correct and accordingly we affirm.

4-8934 221 S. W. 2d 412

Opinion delivered June 20, 1949.

J. F. Quillin and *Shaw & Spencer,* for appellant.

Martin & Martin and *Hal L. Norwood,* for appellee.

MINOR W. MILLWEE, Justice. This suit involves the title to 120 acres of wild and unimproved timber lands in Polk county. In 1925 the United States issued its patent to R. A. Smith who conveyed to Oscar Phillips in 1928. Oscar Phillips conveyed to W. H. Burns and Kate Burns, his wife, in 1932 and the latter reconveyed to Oscar Phillips by warranty deed on May 8, 1946. On June 1, 1946, Oscar Phillips conveyed by warranty deed to appellee, Coyle Watkins.

The land forfeited for the 1941 taxes and a local agent of Paul Brown and John Entriken, non-residents, purchased at a tax sale on November 9, 1942. A clerk's tax deed was issued to Brown and Entriken on November 11, 1944. On November 14, 1945, a decree was entered on the ex parte petition of Brown and Entriken confirming their title to the lands. On December 30, 1946, Brown and Entriken conveyed by quit claim deed to O. F. Phillips, who is not related to appellee, Oscar Phillips. O. F. Phillips conveyed by a quit claim deed to appellant, Charles Hensley on February 3, 1948.

Taxes on the land for the years 1942 to 1945, inclusive, were paid by W. H. Burns. Appellee, Coyle Watkins, paid the 1946 taxes and appellant paid taxes for the year 1947.

On July 10, 1948, appellees, Oscar Phillips and Coyle Watkins, filed this suit for confirmation of their title and to cancel the 1942 tax sale, the clerk's deed based thereon and to vacate the confirmation decree rendered in favor of Brown and Entriken on November 14, 1945. The complaint alleged the 1942 tax sale to be void because the clerk did not, before the date of sale, make a certificate showing publication of the delinquent list of lands as required by law, and that the 1945 decree of confirmation based on said void sale was erroneously granted.

Appellant answered with a general denial and alleged that appellees were barred from attacking the 1945 confirmation decree by the provisions of Ark. Stats. (1947), § 84-1325 and also by a decree confirming title in the State in 1938.

Trial resulted in a decree in favor of appellees holding the 1942 tax sale void and that the confirmation decree of November 14, 1945, was illegally obtained and granted. The 1942 tax sale was ordered cancelled and the 1945 confirmation decree vacated. Title was ordered confirmed in appellee, Coyle Watkins, upon refund to appellant of taxes paid by him for the year 1947.

Appellant's principal contention for reversal is that appellees are barred from attacking his title by Ark. Stats. (1947), § 84-1325 (§ 8719, Pope's Digest). This statute provides that owners of lands embraced in a confirmation decree in favor of the State shall be barred from attacking said decree after the lapse of one year. Appellant cites cases which hold that the alleged defect in the 1942 tax sale is an irregularity which is cured by a confirmation decree rendered pursuant to the statute. While appellant alleged in his answer that title had been confirmed in the State, there is nothing in the record to indicate that the land in controversy was ever sold or certified to the State, or that it was involved in a confirmation suit brought by the State. If the land forfeited for taxes prior to 1941, it was apparently redeemed, since it was continuously assessed in the name of the owner. Under the record here presented, the State had no title or interest in the land to which appellant could be subrogated under § 84-1325, supra.

The record discloses that the sale at which the appellant's predecessor in title purchased the land was held November 9, 1942. It is undisputed that the certificate of the county clerk showing publication of the delinquent list of lands required by Ark. Stats. (1947), § 84-1103, was made January 7, 1943. The clerk who made the certificate was not clerk when the lands sold. The case of Cecil v. Tisher and Friend, 206 Ark. 962, 178 S. W. 2d 655, also involved the validity of a tax sale of lands in

Polk county. It was there held that the failure of the clerk to make and attach the certificate of publication of the delinquent list prior to the date of sale rendered the tax sale void. It was further held in that case that two years actual adverse possession by the holder of a clerk's tax deed was necessary to bar an action of the owner of the original title to recover the land under the provisions of Ark. Stats. (1947), § 34-1419, (§ 8925, Pope's Digest).

In Hixon v. Fulks, 210 Ark. 204, 194 S. W. 2d 870, relied on by appellant, we held (Headnote 3): "Since the sale under which appellant claimed was void, and he had not had actual possession of land which was wild and unimproved, he could not successfully resist appellee's action to cancel his deed." See, also, Standard Securities Co. v. Republic Mining & Manufacturing Co., 207 Ark. 335, 180 S. W. 2d 575. It is undisputed that the land here involved is wild and unimproved and that neither appellant nor his predecessors in title have ever been in actual possession. It follows that the 1942 tax sale was invalid and open to attack by appellees, unless the confirmation decree of November 14, 1945, operated to cure the defect in said sale.

Brown and Entriken received their tax deed from the clerk November 11, 1944, and obtained the confirmation decree upon their ex parte petition on November 14, 1945. This decree recites that petitioners are the owners and in possession of the wild and unimproved lands; that notice has been published as required by law; that no person has intervened to claim an interest in the land; and that no person owns or claims any interest therein adverse to that of petitioners. Ark. Stats. (1947), §§ 34-1901 to 34-1912, set forth the procedure by which title to wild and unimproved lands may be quieted. If Brown and Entriken, appellant's predecessors in title, were proceeding under this statute, then the record discloses that there was no compliance with § 34-1909, which provides that the confirmation decree shall not be binding on any person who has paid taxes on the land within seven years unless he be made a party. In Grayling Lumber Co. v. Tillar, 162 Ark. 221, 258 S. W. 132, it was

held that a decree of confirmation under this statute was void as to a person who paid taxes within seven years preceding the filing of the petition for confirmation and who was not made a party. It was also held that the suit brought by such omitted party for the purpose of quieting his title and vacating the decree of confirmation constituted a direct attack thereon.

Although appellees did not pay taxes within seven years preceding the filing of the confirmation petition by Brown and Entriken their grantor, W. H. Burns, did pay said taxes for the years 1942 to 1945 and was not made a party to the confirmation suit. Appellees succeeded to all the rights of W. H. Burns under their respective warranty deeds and were, therefore, entitled to the relief granted by the trial court under this statute.

If the 1945 confirmation decree was obtained under the provisions of Ark. Stats. (1947), §§ 34-1918 to 34-1925, the record also shows that the petitioners did not comply with this statute. Section 34-1920 provides there shall be no confirmation unless the petitioner or those under whom he claims have paid the taxes on the lands for at least two years after the expiration of the right of redemption, said payment of taxes to be three consecutive years immediately prior to the application to confirm, and that copies of tax receipts showing such payment shall be filed with the petition. Brown and Entriken paid no taxes on the land in controversy and the payments required by the statute were made by appellees' predecessor in title, W. H. Burns. It follows that the 1945 confirmation decree was ineffectual to confirm title in appellant's predecessors in title under this statute.

Appellant also contends that appellees failed to meet the requirements of Ark. Stats. (1947), § 84-1313, which sets out the grounds upon which a clerk's tax deed may be defeated and provides "But no person shall be permitted to question the title acquired by a deed of the Clerk of the County Court, without first showing that he, or the person under whom he claims title to the property, had title thereto, at the time of the sale, or that title was obtained from the United States, or this State,

after the sale, and that all taxes due upon the property have been paid by such person, or the person under whom he claims title as aforesaid . . . ." One of the grounds mentioned in the statute is the omission "to give notice of the sale."

Appellant argues that since the failure of the clerk to make the certificate to the delinquent list prior to the sale is not mentioned in § 84-1313, supra, appellees are not in position to question the clerk's deed to Brown and Entriken. We held to the contrary in Standard Securities Co. v. Republic Mining & Manufacturing Co., supra, on the authority of the cases of Cooper v. Freeman Lumber Co., 61 Ark. 36, 31 S. W. 981, 32 S. W. 494, and Logan v. Eastern Ark. Land Co., 68 Ark. 248, 57 S. W. 798. It was said in these cases that the failure of the county clerk to properly execute and attach the certificate to the delinquent list prior to the sale is a meritorious defense which the owner cannot be deprived of by the deed of the county clerk to the purchaser at the tax sale. It was also held in the Standard Securities Co. case that a landowner, who failed to pay taxes on the land continuously since its forfeiture, was not precluded from asserting invalidity of the tax sale on account of the failure of the clerk to properly execute the certificate.

As previously stated neither appellant nor his predecessors in title paid any taxes on the land until 1948. It was then that appellees learned for the first time of the 1945 confirmation decree and the present suit was instituted. We cannot agree with the contention that as between appellant and appellees the former has the superior title and will be deemed to have been in possession during the two years prior to commencement of the instant suit. Where land is wild and unimproved, it is in the constructive possession of the person holding the legal title. Chancellor v. Banks, 92 Ark. 497, 123 S. W. 650. Since the decree in favor of Brown and Entriken was illegal and void as against appellees, the latter had a perfect paper title to the lands which was superior to the title of appellant, and the lands being wild and unimproved were in the constructive possession of appellees and those under whom they claim.

The decree canceling the outstanding title of appellant and quieting the title of appellee, Coyle Watkins, is accordingly affirmed.

CARNES *v.* BUTT, CHANCELLOR.

4-8988 221 S. W. 2d 416

Opinion delivered June 20, 1949.

William C. Jenkins and *Grant & Rose,* for petitioner.

G. T. Sullins and *Rex W. Perkins,* for respondent.

PER CURIAM. By petition for *certiorari* C. E. Carnes, J. S. Kreitzer, J. M. Thornsberry, Jack Winters, Jesse Barnes, and Robert Eaton have asked this Court to set aside their conviction on contempt charges. The controversy grows out of a complaint filed May 4, 1949, by Carl Tune. He alleged a contract with Ozarks Rural Electri-

fication Cooperative to build a warehouse in Fayetteville for use of Cooperative.

The original complaint charged that C. E. Carnes, personally, and in his capacity as representative of International Hod Carriers' Building and Common Laborers Union, and Melvin Han, as president of Local No. 107, American Federation of Labor, and Local *per se,* caused a strike to be called April 19, in consequence of which unlawful picketing was being carried on. It was further alleged that these activities, as practiced, were in violation of Act No. 193 of 1943. A temporary restraining order was sought. The record before us shows that the parties appeared in person and by their attorney, and after testimony had been heard, "and with consent of the defendants", they, their agents and employees were temporarily restrained from interfering with progress of the work "by threats, intimidation, or otherwise". They were also forbidden to picket until their legal right to do so in the circumstances should be determined. When Carnes and the five other defendants concerned with this proceeding disobeyed the Court's order, they were cited to show cause why judgments as for contempt should not be pronounced. They entered pleas of not guilty and on May 9th the cause was continued until May 17th, bond for $500 in each case being required. The decree of May 17th recites that " . . . by agreement of the parties, the hearing on contempt comes on for further evidence to be introduced". Following the hearing fines of $50 and ten days in jail were assessed against each. Execution of the judgments was stayed until a review by this Court could be had.

Petitioners insist that the Court was without jurisdiction because an injunction bond was not executed. We think a complete answer is that the order of May 4th was by consent. It is clearly shown that when the defendants were brought into Court they were not certain respecting their rights, and required time to confer with counsel, and an opportunity to employ additional counsel, hence the delay was for their advantage and they had a right to consent to be bound by a temporary order. It is now insisted that the Court could not prohibit peaceful pick-

eting. Where a Court has jurisdiction of the subject matter and the person, it may exercise its apparent power, even though error is committed in doing so, a matter not reached for consideration here. The principle upon which the trial Court in this case proceeded was that facts in support of the plaintiff's allegations were yet to be developed, and the defendants likewise were entitled to be heard in opposition to the plaintiff's charges of illegal picketing. But during the interim allowed for the benefit of each side, the defendants arbitrarily concluded that the Court was wrong in issuing the injunction, hence it could be disobeyed without penalty. The law is otherwise. The proper procedure would have been to obey the order until a higher Court passed upon its validity.

On review it is urged that the injunction was not a consent order and that its presentation as such is erroneous. If so, this could have been shown through a bystanders' bill of exception. Our statutes protect litigants against such mistakes and give preferential consideration to the bill.

The situation narrows down to the simple proposition that the defendants chose to follow advice of persons who were mistaken regarding legal effect of what they proposed to do. In taking this course they assumed the responsibility for that mistake, and their misfortune must be left to the sound discretion of the trial court.

The relief prayed for in the petition is denied.

TOOMBS *v.* BLANKENSHIP.

4-8892 221 S. W. 2d 417

Opinion delivered June 20, 1949.

Kirsch & Cathey and *Phil Herget,* for appellant.

L. V. Rhine, Bon McCourtney and *Claude B. Brinton,* for appellee.

MINOR W. MILLWEE, J. T. A. Blankenship was a resident of Greene County, Arkansas, at the time of his death on June 10, 1948, at the age of 65. He left surviving him three children as his sole heirs at law. They are C. W. Blankenship, a son, and Floice Blankenship

Toombs, a daughter, who are the appellants here, and a son, Loice Blankenship, the appellee. At the time of his death, decedent owned his farm which was worth approximately $12,000 and personal property of the value of approximately $8,000.

On June 16, 1948, appellee applied for an order admitting to probate an instrument dated February 14, 1948, purporting to be the last will of his father. On the same date there was filed the affidavits of the two attesting witnesses to the will. Under the terms of the will decedent devised and bequeathed all his property to appellee who was also appointed executor to serve without bond. The will mentions appellants and provides that they shall receive nothing "for the reason that they are already amply provided for and I feel I have done my part by each of them". Appellants filed their protest and objections to probate of the will on the grounds of lack of mental capacity and undue influence. After a three day hearing at which some 550 pages of testimony were taken, the trial court entered an order finding that decedent had testamentary capacity and was not subjected to undue influence at the time of the execution of the will, which was ordered admitted to probate.

The principal contention for reversal of the judgment is that the trial court's finding as to testamentary capacity and undue influence is against the preponderance of the evidence. We shall not attempt a detailed discussion of the highly conflicting evidence on these issues. A majority of the witnesses are relatives of the parties and their testimony is in hopeless conflict as to the extent and nature of decedent's physical and mental condition before and after the execution of the will on February 14, 1948. This testimony is characteristic of the extravagance of statement, bias and partisanship that often result when brother is arrayed against brother in legal combat.

T. A. Blankenship resided in Missouri where he engaged in farming for many years prior to 1947. Early in 1947, he sold his farm and moved to one that he purchased in Greene County, Arkansas. Each of the appel-

lants lived with their father on the Missouri farm until about 1932 when they both married and moved to homes of their own. After appellee married he remained with his father and moved to the Arkansas farm with his wife and seven children in 1947. Although appellee was lame from childhood, he was not disabled and assisted his father in farming operations, taking whatever the latter chose to pay him for his services until 1948 when he received the customary one-third and one-fourth crop rent. Neither decedent nor his children ever attended school. Appellant, C. W. Blankenship owned his 114-acre farm at the time of his father's death. Appellant, Floice Toombs, and her husband were not so successful at farming and decedent made a loan of $1,000 to them in May, 1947, under an agreement that the Toombs would sell their place and repay the loan. Mrs. Toombs testified that they had a crop failure in 1948 and were unable to make payment.

In February, 1947, decedent suffered what his physician, Dr. R. J. Haley, designated a mild stroke. Dr. Haley treated decedent at intervals from the time of his first illness until his death. He testified that decedent was suffering from arteriosclerosis, high blood pressure, and, at times, a kidney condition; that while his illness affected him mentally, his condition never became psychopathic or reached the stage where confinement in an institution was necessary; that decedent's mind would come and go and he experienced lucid intervals when his "mental qualities" appeared normal from February, 1947, until the date of his death. In response to a hypothetical question based on facts testified to by witnesses for appellants, Dr. Haley stated that decedent would not, in his opinion, have been mentally capable of executing a will on February 14, 1948. In answer to a similar question based on a state of facts as related by witnesses for appellee, he stated that decedent would have had sufficient mental capacity to execute the will in question. Decedent consulted Dr. Haley at his office on the day the will was executed, but the doctor would not undertake to say what his mental condition was at that time.

The testimony on behalf of appellees discloses that on the morning of February 14, 1948, decedent got the deed to his farm from his daughter-in-law and came to Paragould with appellee and some of his children. The children went to a show and decedent and appellee went to the courthouse where decedent paid his taxes and procured a poll tax receipt. Decedent and appellee then separated and decedent went to his bank and cashed a check for $50 and made a visit to the office of Dr. Haley. He also went alone to the office of his attorney where he remained for some time and executed his will between 2:00 p. m. and 3:00 p. m. The will was witnessed by the attorney and Lester J. Johnson. Decedent explained to his attorney that appellant, C. W. Blankenship, was "pretty well fixed" and did not need help; that he had given or made a loan of $1,000 to Mrs. Toombs and that she was fixed so she could take care of herself; that appellee had stayed with him and had received nothing for his labors, but a bare living, and decedent felt that everything he had was due to appellee's efforts. After the will was dictated to the stenographer, it was read back to decedent and he stated that that was the way he wanted it. Decedent furnished his deed for land descriptions written in the will. Although he spoke distinctly, he misspelled the names of his children. The will was left with the attorney and placed in the office safe.

Mrs. Joe Bynum, a teller at the Security Bank, testified that decedent usually came to her window and during the last several months of his life had witness to sign and witness his mark to checks. She stated that decedent was able to transact banking business without assistance from others who might accompany him; that he made his own deposits without making mistakes; and that he cashed a check for $50 on the date of the execution of the will. It was her opinion that decedent had sufficient mental capacity to make a will at that time.

E. R. Browning, cashier of the bank, testified that he had known decedent since the early thirties and visited with him when he transacted business at the bank, and that he noticed no change in decedent's mental condition

during the time he knew him. Decedent changed his bank account to a joint account with appellee sometime between April, 1947, and March, 1948.

There was other evidence that decedent suffered from failing eyesight, was forgetful, and would at times become lost. Most of the instances of loss of memory occurred after the execution of the will in question. There was also evidence that decedent became seriously ill on the evening of February 14, 1948, following his trip to Paragould.

In the recent case of Blake v. Simpson, 214 Ark. 263, 215 S. W. 2d 287, we reaffirmed the rule stated in Griffin v. Union Trust Co., 166 Ark. 347, 266 S. W. 289, as follows: "Old age, physical incapacity, and partial eclipse of the mind will not invalidate a will, if the testator has sufficient capacity to remember the extent and condition of his property without prompting, to comprehend to whom he is giving it, and be capable of appreciating the deserts and relations to him of others whom he excluded from participating in his estate. He is not required to do all those things, but should have capacity to do them."

We further said in the Blake case: "The principle is well established that it is not within the province of courts and juries to make wills for persons by decrees and verdicts rendered in will cases. Testamentary power inheres alone in the testator. Subject to restrictions and limitations fixed by statute, or by recognized rules of law and public policy, an owner may dispose of his property by will as he pleases. Within certain limits 'he is permitted to project his individuality, his grasp and his desires, beyond the grave, and make them effective through his last Will and Testament'. The fact that his will is unjust, unnatural, or unreasonable does not affect its validity. No relative or next of kin, no matter how near they may be, or how deserving of the testator's bounty, has any legal or natural right to the estate which can be asserted against the legally executed will of the testator. Thompson on Wills, Second Edition, § 18, p. 31." See, also, Puryear v. Puryear, 192 Ark. 692, 94

S. W. 2d 695; Pernot v. King, 194 Ark. 896, 110 S. W. 2d 539; Shippen v. Shippen, 213 Ark. 517, 211 S. W. 2d 433; Scott v. Dodson et al., 214 Ark. 1, 214 S. W. 2d 357.

We have also repeatedly held that the questions of testamentary capacity and undue influence are so interwoven in any case that the court necessarily considers them together. In Phillips v. Jones, 179 Ark. 877, 18 S. W. 2d 352, the court said: "Where the mind of the testator is strong and alert the facts constituting the undue influence would be required to be far stronger in their tendency to influence the mind unduly than in another, where the mind of the testator was impaired, either by some inherent defect or by the consequences of disease or advancing age. It is clear that feeble intellect will not be of itself sufficient to establish lack of testamentary capacity, for that condition must be so great as to render the testator incapable of appreciating the nature and consequences of his act; but this feebleness may be inferred when, from the facts in proof, it is apparent that he was incapable of appreciating the deserts and relations of those whom he excludes from participating in his estate, although he might have had the ability to retain in memory, without prompting, the extent and condition of his property, and to comprehend to whom he was giving it." It was also held in Brown v. Emerson, 205 Ark. 735, 170 S. W. 2d 1019, that, where a testator's disposition of his property is unaccountably unnatural, less evidence is required to establish undue influence.

On the question of undue influence we have many times reaffirmed the following statement of the court in McCulloch v. Campbell, 49 Ark. 367, 5 S. W. 590: "As we understand the rule, the fraud or undue influence, which is required to avoid a will, must be directly connected with its execution. The influence which the law condemns is not the legitimate influence which springs from natural affection, but the malign influence which results from fear, coercion or any other cause that deprives the testator of his free agency in the disposition of his property. And the influence must be specially directed toward the object of procuring a will in favor

of particular parties. It is not sufficient that the testator was influenced by the beneficiaries in the ordinary affairs of life, or that he was surrounded by them and in confidential relations with them at the time of its execution.''

This is not a case where the testator has designated a remote kinsman or acquaintance outside the family circle as beneficiary to the exclusion of his own flesh and blood. While it may appear that decedent's act in disinheriting two of his children was unjust and unnatural in the circumstances here, neither the probate court nor this court is authorized to strike down the will and to make what we might consider a more equitable disposition of decedent's property unless the greater weight of the evidence shows that he did not have the mental capacity to realize the respective deserts and relationship of his children or that the disposition he chose to make was induced by undue influence. There is a paucity of evidence of undue influence. While decedent was on good terms with all of his children, there was doubtless a strong bond of affection and attachment between decedent and the son and grandchildren with whom he spent his last years. It is undisputed that appellee was a loyal and dutiful son whose industry and efforts contributed in a large measure to the accumulation of the estate left by his father. This close relationship may have influenced decedent in making his will, but the evidence is insufficient to show that it was corruptly exercised and exerted for that purpose. The issue of mental capacity presents a closer question and the testimony is in hopeless conflict. The trial court saw and heard the witnesses and we cannot say that his finding on the whole case is against the preponderance of the evidence.

Appellants also contend that error was committed in the court's refusal to permit the introduction of a written statement made by Dr. Haley to counsel for appellants prior to the trial. The writing contained some hearsay statements and it is not clear from the record for what purpose it was offered. The doctor was present and gave his testimony and counsel for appel-

lants declined to say that the written statement was offered for the purpose of impeaching him as a witness. The writing might have been admissible for this purpose since it stated that decedent was not, in the doctor's opinion, capable of understanding ordinary business transactions during the last six months of his life. Doctor Haley had previously testified that he would not undertake to say whether decedent was mentally capable of executing a will on Feb. 14, 1948. We find no error in excluding the written statement.

We agree with appellants' contention that Dr. Haley should have been permitted to give his opinion, based on his own personal knowledge, as to decedent's mental capacity. Since he had treated decedent for over a year he was qualified to give his opinion based on either hypothetical facts as an expert or facts within his own knowledge, or both. 20 Am. Jur., Evidence, § 793. Again it is not clear from the record that the court refused to permit Dr. Haley to state his opinion from his personal knowledge. The court first sustained appellee's objection to the testimony on the ground that it was merely a repetition of previous testimony given by the doctor. After an extended colloquy, the court changed his ruling and overruled appellee's objection. Instead of restating the question or asking for an answer, counsel for appellant again offered the written statement with Dr. Haley still on the witness stand. Even if we treat the court's rejection of the written statement as a refusal to permit Dr. Haley to give an opinion based on personal knowledge, we still conclude that the judgment of the trial court is not against the preponderance of the evidence.

Affirmed.

BICKFORD *v.* CARDEN.

4-8916 221 S. W. 2d 421

Opinion delivered June 20, 1949.

[redacted]

Paul L. Washington and *Hal L. Norwood,* for appellant.

Shaw and Spencer, for appellee.

GRIFFIN SMITH, Chief Justice. The appellant, Bickford, through inheritance, claims an interest in Polk County lands owned by Bota Carden when he died intestate in December 1946. The appellee, Grady Carden, has acquired title of all the heirs except Joe Carden Bickford, who says his father was Julius Carden, and that Julius was Bota Carden's brother.

The Special Chancellor found that appellant's claim should be denied for want of proof that his father and mother were competent to contract a common law marriage, each, at the time their relationship began, having a living spouse.

Oklahoma is one of eighteen states where recognition is given common law marriages, hence appellant's status must be determined by the laws of that forum. In this State, 5 Ark. Stats. (1947) 55-110, all marriages contracted in another jurisdiction which would be valid where made, and where the parties then actually resided, "shall be valid in the courts of this State". See *Feigenbaum* v. *Feigenbaum,* 210 Ark. 186, 194 S. W. 2d 1012.

We have held that the children of a marriage void because the husband and father had a former wife living, are legitimate and entitled to share in their father's estate. *Evatt* v. *Miller,* 114 Ark. 84, 169 S. W. 817, L. R. A. 1916C, 759; *Cooper* v. *McCoy,* 116 Ark. 501, 173 S. W. 412.

Appellant's claim that Julius Carden was his father, and his contention that Julius and Eva Bickford contracted a common law marriage, are referable to transactions on a farm near Shawnee, Oklahoma, between 1904 and 1908. Julius Carden was suspected of bank robbery, in Arkansas, and he was evading officers. After arrest and conviction he was killed while attempting to escape.

Montgomery County records show that Julius Carden and Naomie Reeves were married at Mt. Ida October 6, 1904, and were divorced February 5, 1908. Appellant was probably born in 1907. Ann Herndon had a daughter named Eva, who married Harry Bickford in Kansas. Mrs. Herndon testified that Eva's marriage to Bickford occurred in June, but she did not remember the year. Before Julius Carden appeared as a temporary cotton picker on the Littleton farm near Shawnee—close to where the Herndons then lived—Eva had given birth to three children, conceded to have been Bickford's. During Bickford's frequent periods away from home, Julius began keeping company with Eva. Bickford wrote Mrs. Herndon, or some member of the family, that he had divorced Eva "and had married another woman". Julius frequently lived with Eva in her mother's home, contributed to her upkeep, and, according to Mrs. Herndon and one or two other witnesses, introduced her as his

wife. After Joe was born Julius left the community, but sometimes came back and always mentioned Joe as his son and Eva as his wife. The child, however, was never called Carden. The grandmother explained this by saying that when she and Eva and other members of the family found that Julius was wanted as a criminal, "she couldn't get rid of him. It was all in the papers, here and everywhere".

Eva's fifth child, Bobby, was younger than appellant. It is conceded that Bickford was Bobby's father; hence, if Bickford's alleged letters regarding a divorce from Eva and his marriage to another spoke the truth, he later returned to Oklahoma and cohabited with his ex-wife, whom his former mother-in-law claims was then Carden's common-law life. A birth certificate shows that Bobby was born November 6, 1910, and his parents were listed as Harry and Eva Bickford.

We think the record amply supports the Special Chancellor's finding that appellant was "not more" than the product of an illicit relationship between Julius Carden and Eva Bickford, conceived at a time when neither was capable of contracting marriage under the common law prescripts of Oklahoma.

A discussion of common law marriages in Oklahoma is to be found in the opinion of Judge Alfred P. Murrah, of the Tenth Court of Appeals. See *Jones* v. *Kemp,* 144 Fed. 2d 478. Such marriages are valid if based upon a good faith intention to enter into a lawful relationship.[1] A West Publishing Company headnote to the Jones-Kemp case reads: "Where at time man and woman commenced living together in Oklahoma the woman had a living undivorced husband, there was no valid 'common law marriage', and the relationship between parties did not, without more, ripen into a legal marriage upon death of undivorced husband two years thereafter". The Oklahoma cases make use of the words "competent parties" in determining whether at the inception of a common

[1] Judge Murrah's opinion is cited because the author is a native Oklahoman. He was born in Johnston County in 1903, graduated from a Tulsa high school, was appointed U. S. District Judge in 1937, and promoted to the Court of Appeals in 1940.

law relationship the foundation for marriage existed. Since a civil contract is involved, each participant must be without legal impediment. If restrained by obligations to another the purpose cannot be consummated.

Appellant argues, in the alternative, that if the common law marriage failed, still he is protected by Tit. 10, § 55, Okla. Stats. 1941. It provides that "the father of an illegitimate child by publicly acknowledging it as his own, receiving it as such, with the consent of his wife, if he is married, into his family, and otherwise treating it as if it were a legitimate child, thereby adopts it as such, and such child is thereupon deemed for all purposes legitimate from the time of its birth".

Construing the foregoing section, a *per curiam* opinion in *Thompson* v. *Thompson,* 177 Okla. 437, 60 Pac. 2d 615, held that Mamie and George Thompson, to establish their claim of legitimation, were required to prove (1) illegitimacy, (2) paternity, (3) public acknowledgment by the father, (4) reception into family with wife's consent, and, (5) treatment as legitimate. See *Orsburn* v. *Graves,* 213 Ark. 727, 210 S. W. 2d 496.

An annotation in 73 A. L. R., p. 942, dealing with the law of the situs of property, as such, as determining legitimacy, contains this comment: ". . . The question whether a child born out of wedlock is or is not legitimate, though arising in connection with his right to inherit property, relates not to the descent or distribution of property, but to his status, and as such is to be governed not by the law of the situs as such, but by the law of the state creating the status".

Chief Justice Gray, in *Ross* v. *Ross,* 129 Mass. 243, 37 Am. Rep. 321, said: "It is a general principle that a status or condition of a person, the relation in which he stands to another person, and by which he is qualified or made capable to take certain rights in that other's property, is fixed by the law of the domicile, and that this status and capacity are to be recognized and upheld in

every other state, so far as they are not inconsistent with its own laws and policy".[2]

It is urged by appellant that consideration should be given the presumption that if Harry Bickford had ever been the husband of Eva Herndon, he had obtained a divorce before Eva began her associations with Carden—"even though it involves the proving of a negative". But if this should be conceded, there remains the further fact—testified to by Eva's mother, and by appellant—that after appellant was born, and while what is claimed to have been a common law marriage continued, Bickford's cohabitation with Eva was responsible for her fifth child.

Appellant's entire proof was directed to the single effort of proving legitimacy. We think the Special Chancellor correctly found that incapacity to contract prevented the relationship between Julius and Eva from attaining the status contemplated by the standards of conduct and ability mentioned in numerous decisions of the Oklahoma Supreme Court. Nor can appellant prevail on the theory that while his position as a valid common law child has failed, the proof preponderated to establish confirmed illegitimate fatherhood. Most of the testimony tending to show recognition of Eva's fourth child by the putative father was given by interested parties, and is too sketchy to be of actual value in a case where the point to be proved involved opposing facts.

Affirmed.

MORRIS *v.* ARRINGTON, ADMINISTRATRIX.

4-8921 221 S. W. 2d 406

Opinion delivered June 20, 1949.

[2] The so-called "right" as fixed by domiciliary laws, is a matter of comity, not controlled by the constitutional provision relating to full faith and credit. *Olmstead* v. *Olmstead,* 216 U. S. 386, 30 S. Ct. 292, 54 L. Ed. 530, 25 L. R. A., N. S., 1292.

C. C. Wait, for appellant.

J. M. Smallwood, for appellee.

Ed. F. McFaddin, Justice. This appeal involves a claim against the estate of Harry Morris, who died on April 28, 1946, at the age of 62 years. He was a bachelor, and for many years lived at the home of his sister, Mrs. C. W. Morgan, whom he had named as beneficiary in a life insurance policy for the face amount of $1,000. Mrs. Morgan predeceased Harry Morris, and he failed to designate another beneficiary, so that the proceeds of the policy were paid to Morris' administrator. Thereupon the husband and heirs of Mrs. Morgan (there being no administration on her estate) filed claim against Morris' estate on account of room and board for the period of three years immediately preceding his death. Appellants, being the other heirs of Morris, resisted the claim. The Probate Court allowed the claim in the sum of $720, and appellants— in seeking to reverse the judgment— present the three points now to be discussed.

I. *Appellants Insist that This Claim Can be Filed Only by an Administrator of the Estate of Mrs. Morgan.* There was no administration on Mrs. Morgan's estate, and this claim was filed by the husband and children of Mrs. Morgan. Such procedure is sanctioned by § 1, Pope's Digest,[1] which reads in part: "When all the heirs of any deceased intestate and all persons interested as distributees in the estate of such intestate are of full age, it shall be lawful for them to sue for, recover and

[1] See § 62-104 Ark. Stats of 1947.

collect all demands and property left by the intestate, ..."

See, also, Beneux v. Brown Shoe Co., 191 Ark. 579, 87 S. W. 2d 28. The affidavit to the claim against the estate of Harry Morris is in the language of § 101, Pope's Digest.[2] So we disallow the appellants' first contention.

II. *The Claimants as Witnesses.* At the trial in the Probate Court Mr. Morgan and two of Mrs. Morgan's daughters—all three witnesses being claimants—testified as to the amount of the claim and to statements made by the deceased. Appellants insist that the testimony of each of these three witnesses violates § 2 of the schedule of our Constitution, which reads in part: ". . . in actions by or against executors, administrators or guardians in which judgment may be rendered for or against them, neither party shall be allowed to testify against the other as to any transactions with or statements of the testator, intestate or ward, unless called to testify thereto by the opposite party."[3]

We agree that the evidence of Mr. Morgan and his two daughters should be excluded. Probate appeals are tried in this court *de novo,* and we consider only legally competent evidence in arriving at our decision, so we disregard the excluded testimony.[4]

III. *The Sufficiency of the Evidence.* With the incompetent evidence excluded, we come then to the sufficiency of the remaining evidence. Charles Wilson was a business associate of the deceased, Harry Morris, and was a legally competent witness. Wilson testified that for many years Morris boarded at the home of his sister, Mrs. Morgan; that Morris told him that "he wanted to take care of her and pay her for the trouble she had gone to in taking care of him." Wilson also testified that he knew another person similarly situated who had been paying $15 per week for room and board during the

[2] See § 62-1008 Ark. Stats. of 1947.

[3] See, also, Cash v. Kirkham, 67 Ark. 318, 55 S. W. 18; Davis v. Nipper's estate, 207 Ark. 83, 179 S. W. 2d 183; and see, also, annotation in 155 A. L. R. 961.

[4] Campbell v. Hammond, 203 Ark. 130, 156 S. W. 2d 75 and see Davis v. Nipper's estate, 207 Ark. 83, 179 S. W. 2d 183.

preceding two or three years. The claim, here, was filed for $1,440, being room and board at $40 per month for three years. There was evidence, however, that Morris had provided some of the grocery items from time to time; so the Probate Court allowed the claim for $720, and rendered judgment for that amount. Appellants say that the filing of the claim for room and board was an "afterthought", and an effort to obtain the insurance money which failed to come to Mrs. Morgan since she predeceased the insured. Even so, the claim was duly and properly filed, and there was ample evidence that a claim for room and board was justly due and owing, and that the deceased intended for Mrs. Morgan to be paid. We cannot say that the judgment is contrary to the preponderance of the evidence.

Affirmed.

WARREN *v.* WARREN.

4-8939 221 S. W. 2d 407

Opinion delivered June 20, 1949.

Warren E. Wood and *Griffin Smith, Jr.,* for appellant.

Quinn Glover and *Carl Langston,* for appellee.

GEORGE ROSE SMITH, J. Upon the first appeal in this cause we affirmed the granting of a divorce to appellee

but awarded alimony to appellant in the amount of $30 a month. *Warren v. Warren,* 214 Ark. 379, 216 S. W. 2d 398. Appellee's failure to pay the first three installments resulted in a citation for contempt of court. The chancellor ordered payment of the amount past due but reduced the allowance for the future to $15 a month. This appeal questions the modification.

Of course the chancellor may modify an award of alimony from time to time, but the power is to be exercised to meet changes in the relative circumstances of the parties. After studying the record made at each hearing we are unable to say that there has been any change necessitating a reduction of the award. Appellee's monthly income at the time of the first trial consisted of earnings averaging from $75 to $100 and a pension of $27.60. At the second hearing he estimated his income at about $100 a month in addition to the pension. Appellee intends to enter a hospital for treatment of the injury for which he receives a pension, but until he does so his earning capacity is not more adversely affected by the injury than it was at the time of the first trial. There was also some additional testimony as to the extent of appellant's property ownership. Even if it were held that a more detailed presentation of proof originally available is sufficient to support a modification in the amount of alimony, here the difference is so slight that it would not have affected the award first made. We conclude that a reduction of the award is not at present warranted by the evidence.

Appellant asks us to allow an attorney's fee, as authorized by Ark. Stats. (1947), § 34-1210. This request is addressed to the court's discretion. The proof shows that appellant is able to pay her attorney, while the appellee will have difficulty in paying for the services of his own counsel. Upon this showing we do not feel that the allowance should be made. See *Zeddy v. Zeddy,* 180 Ark. 235, 21 S. W. 2d 157.

Reversed.

GRIFFIN SMITH, C. J., not participating.

CALICO *v.* HUNTSVILLE PAVING IMPROVEMENT DISTRICT NO. ONE.

4-8973 221 S. W. 2d 769

Opinion delivered June 27, 1949.

Frank S. Rice, for appellant.

Charles W. Ivie, for appellee.

GEORGE ROSE SMITH, J. This is a taxpayer's action to enjoin the appellee paving district from proceeding with the work for which it was organized. Appellant pleaded a number of defects in the organization of the district, but only one need be discussed.

The petition, signed by the owners of two-thirds in value of the real property in the district, recites that the district is to pave "approximately eight miles of streets within the City of Huntsville." The notice published by the city clerk describes the improvement as the paving of all streets within the city; the ordinance states that the district is to pave "all streets possible with asphalt paving." It is stipulated that there are 8.6 miles of unpaved streets in Huntsville, all of which appellee proposes to pave.

We think the petition so indefinite as to be fatal to the validity of the district. While the details of construction may be left to the judgment of the commission-

ers, it is essential that the petition describe with certainty the improvement proposed. The landowners, not the commissioners or the city council, must decide what streets are to be paved. *Less* v. *Improvement Dist. No. 1 of Hoxie,* 130 Ark. 44, 196 S. W. 464. Here the commissioners were directed by the petition to improve approximately eight miles of streets. The district insists that the improvement of 8.6 miles substantially complies with the petition, but that fact does not meet the objection. It could equally well be said that paving exactly eight miles would be substantial compliance, leaving the commissioners to determine which fraction of a mile should remain unpaved. Thus it is clear that this jurisdictional allegation of the petition is not sufficiently definite to point out the improvement proposed.

Reversed.

MALONEY *v.* MCCULLOUGH.

4-8926 221 S. W. 2d 770

Opinion delivered June 27, 1949.

Culbert L. Pearce, for appellant.

Gordon Armitage, for appellee.

MINOR W. MILLWEE, Justice. M. L. McCullough died intestate in White county February 10, 1940, survived by his widow, Carrie McCullough, and four children, all of age. At the time of his death, M. L. McCullough owned and occupied as his homestead the 75 acre tract of land involved in this suit. Carrie McCullough continued to occupy and use the lands as a homestead until her death on March 5, 1948. None of the children occupied the lands after the death of their father and prior to the death of their mother.

Pearl R. McCullough, one of the surviving children of M. L. McCullough, deceased, died intestate and without issue April 11, 1945, survived by his widow, Verla Bee Maloney, who has since remarried and is the appellant here. Appellees are the other three surviving children and heirs of M. L. McCullough, deceased, and brought this suit against appellant to quiet their title to the lands in controversy alleging the facts heretofore stated and that appellant was claiming some interest in the land. It was further alleged that Carrie McCullough had a "life and home stead estate" in said lands and that the remainder interest of Pearl R. McCullough was contingent upon his surviving his mother and was destroyed upon his death without bodily heirs prior to the death of the life tenant.

Appellant's answer and cross complaint admitted the truth of the allegations of the complaint except the assertion that Pearl R. McCullough was a contingent remainderman. Appellant also alleged in her answer that she was entitled to "one-half of whatever interest her late husband, Pearl R. McCullough, has or holds in the estate of his deceased father".

Appellees' demurrer to the answer and cross-complaint was sustained and upon appellant's failure to plead further same was dismissed and a decree rendered in favor of appellees.

Appellant insists that she is entitled to dower in the lands in controversy as the widow of Pearl R. McCullough, deceased, under Ark. Stats. (1947), § 61-206 which reads: "If a husband die, leaving a widow and no children, such widow shall be endowed in fee simple of one-half of the real estate of which such husband died seized, where said estate is a new acquisition and not an ancestral estate; and one-half of the personal estate, absolutely and in her own right, as against collateral heirs; but, as against creditors, she shall be endowed with one-third of the real estate in fee simple if a new acquisition and not ancestral, and of one-third of the personal property absolutely, Provided, if the real estate of the husband be an ancestral estate she shall be endowed in a life estate of one-half of said estate as against collateral heirs, and one-third as against creditors." This statute appeared in Kirby's Digest as § 2709; and Ark. Stats. (1947), § 61-201, appeared as § 2687 of Kirby's Digest. These statutes were construed by this court in McGuire v. Cook, 98 Ark. 118, 135 S. W. 840, Ann. Cas. 1912D, 776, where it was held that an intermediate life estate in another will defeat the widow's right to dower unless it terminates in the lifetime of the husband. Justice Frauenthal, speaking for the court, there said: "By this enactment we do not think the Legislature intended to create in the widow an estate in her deceased husband's lands different in any essential from the estate of dower known at the common law, except as therein expressly provided. At common law it was esssential that the husband should have been seized in possession during coverture in order to entitle his widow to dower in his land. The seisin of her husband was an indispensable prerequisite to entitle the widow to such dower, and an outstanding freehold estate in another before marriage destroyed her claim. Mr. Washburn says: 'The husband must have been seized of the premises at some time during coverture' (1 Washburn on Real Property, (6 Ed.),

§ 390); and further he says that if the husband has only a reversion or remainder after a freehold estate in another, though it be a fee, it will not give to his wife a right of dower therein unless by the death of the intermediate freeholder or the surrender of his estate to the husband. 1 Washburn on Real Property, § 183. In order to constitute seisin, it was necessary that there should be an actual corporeal seisin or the right to make such immediate seisin in the husband during coverture to entitle the widow to dower. Gentry v. Woodson, 10 Mo. 224. Where there is a life tenant, and the husband has only a remainder or reversion in the land, the seisin is in the life tenant; and therefore dower does not attach to realty in which the husband has only an interest in remainder or reversion, unless the particular estate terminates during the coverture . . .

"The same character of seisin that was required by the common law in the husband is required by our statute in order to entitle the widow to dower. In Tate v. Jay, 31 Ark. 576, this court said: 'Seisin is either in deed or in law; seisin in deed is actual possession; seisin in law, the right to immediate possession. Unless such seisin existed during coverture, there can be no dower because it is an indispensable requisite to her right to dower, so declared by statute.' "

The court further said: "We think that under these express provisions it was manifestly intended that the requisites necessary to constitute dower at common law were also necessary to constitute the estate created by this statute. In the case of Tate v. Jay, 31 Ark. 576, it was said that seisin was an indispensable requisite to entitle the widow to dower under the provisions of § 2687 of Kirby's Digest because it was so declared by that statute. Likewise, we think that seisin of the husband is a necessary requisite under § 2709 of Kirby's Digest to entitle the widow to the dower therein provided, because it is so declared by that statute, which says that she shall be endowed of a certain portion of the real estate 'of which the husband shall die seized.' Watson v. Watson, 150 Mass. 84, 22 N. E. 438; Carter v. McDaniel, 94 Ky. 564, 23 S. W. 507."

This interpretation of the statute has been reaffirmed in later cases. Murphy v. Booker, 139 Ark. 469, 214 S. W. 63; Sadler v. Campbell, 150 Ark. 594, 236 S. W. 588; Field v. Tyner, 163 Ark. 373, 261 S. W. 35; Roetzel v. Beal, 196 Ark. 5, 116 S. W. 2d 591. It is in accord with the rule followed generally as stated in the annotation to Geldhauser v. Schulz, 93 N. J. E. 449, 116 Atl. 791, 21 A. L. R. 1073, as follows:: "To entitle a widow to dower at common law, or under a statute declaratory of the common law, the husband must have been seised, either in fact or in law, of an estate of inheritance in the land at some time during coverture. When, therefore, the husband had previous to his death simply a vested remainder expectant on a life estate, his widow cannot be endowed, for, as in such a case the husband never had either possession or any present right of possession, he cannot be said to have had a seisin of any sort, either actual or legal."

Appellant argues that homestead and dower are not regarded as estates and that Pearl R. McCullough took a vested remainder in the lands upon the death of his father and that said vested interest descended to his heirs upon his death. In Jones' Ark. Titles, § 867, the author says: "The term 'homestead' has three meanings: (1) The homestead premises, or the land and dwelling occupied as a home; (2) the homestead exemption, or right to reserve the home from the claims of creditors; (3) the homestead estate, or the interest of the widow and minor children in their deceased husband's and father's homestead, or the interest of the minor children in their deceased mother's homestead." We are here dealing with homestead within the meaning of the third concept stated by the author.

Some jurisdictions take the view that the homestead interest is not an estate at all, but merely an exemption or privilege, while others hold that the claimant is vested with an estate in land. 26 Am. Jur., Homestead, § 5; 40 C. J. S., Homestead, § 3. In Killeam v. Carter, 65 Ark. 68, 44 S. W. 1032, it was said of a homestead that a widow, strictly speaking, had no estate in the land itself but only the right of occupancy and that she "can only be consid-

ered a tenant for life upon condition that she do not abandon." However, in the earlier case of Jones v. Turner, 29 Ark. 280, the court said of a homestead: "The estate thus created is a peculiar one, made equally for the benefit of the wife and children; it may be likened to a joint tenancy, with right of survivorship." See, also, McCloy & Trotter v. Arnett, 47 Ark. 445, 2 S. W. 71; Rowland v. Wadley, 71 Ark. 273, 72 S. W. 994. In Colum v. Thornton, 122 Ark. 287, 183 S. W. 205, it was said: "Our Constitution gives the homestead to the widow for life without any restrictions . . . The Constitution vests in the widow an estate for life and in the children during their minority." See, also, Butler v. Butler, 176 Ark. 126, 2 S. W. 2d 63; O'Connell v. Sewell, 191 Ark. 707, 87 S. W. 2d 985.

It is true that the dower interest of a widow under § 61-206, supra, vests in her immediately upon the husband's death and upon her death will descend to her heirs. Barton v. Wilson, 116 Ark. 400, 172 S. W. 1032. But such dower interest only vests in the widow in real estate "of which the husband shall die seized".

The answer to the contention that the remainder interest vested in Pearl R. McCullough upon the death of his father and descended to the heirs of the remainderman at his death, is that appellant, the widow, does not take as an heir of her deceased husband. She takes dower by virtue of the statute. Robertson v. Adams, 163 Ark. 290, 260 S. W. 37.

Homestead is a valuable right, interest or estate in land which vests in the widow "during her natural life" under Art. 9, § 6 of our Constitution unless and until abandoned or forfeited by the widow. In the case at bar the widow, Carrie McCullough, exercised her homestead right in the lands in controversy until her death which occurred after the death of her son, Pearl R. McCullough. Pearl R. McCullough never had either possession or any present right of possession and was, therefore, never seized of an estate of inheritance in the land during coverture. Appellant, his widow, was not, therefore, entitled to dower in the land.

It follows that the chancellor correctly sustained the demurrer to appellant's answer and cross-complaint and the decree is affirmed.

[redacted]

WILSON *v.* WILLIAMS, JUDGE.

4-8972 221 S. W. 2d 773

Opinion delivered June 27, 1949.

[redacted]

Warren E. Wood and *Griffin Smith, Jr.,* for petitioner.

G. B. Colvin, for respondent.

MINOR W. MILLWEE, Justice. This is an application to this court for a writ of prohibition to prevent the judge of the Perry Probate Court from proceeding furthere in a cause wherein petitioner, Sam H. Wilson, was adjudged to be incompetent and incapable of handling his business affairs and a guardian of his person and estate was appointed.

The petition alleges that the order of the probate court was void for lack of jurisdiction for several reasons, the principal one being that petitioner was not before the court during the inquisition as to his sanity. It was also alleged that the court was proposing to appoint a guardian in succession to Baylor House, deceased, and in so doing was about to proceed without jurisdiction.

The order sought to be annulled recites: "On this 12th day of January, 1949, this matter comes on for hearing before the court upon a charge of insanity filed herein by Baylor House, as Sheriff of Perry County, Arkansas, duly verified, and charging that Samuel H. Wilson is insane and that action should be taken by this Court in regard thereto and further alleging that a guardian should be appointed to look after his affairs and the same is presented to the Court on the evidence of Baylor House, S. V. Gullett, M. H. Garreston, Dr. Stanley Gutowski and Dr. R. A. Jones, and the presence in open Court of the said Samuel H. Wilson from all of which the Court finds that said Samuel H. Wilson is incompetent and not capable of handling his business affairs and that a guardian should be appointed for that purpose."

The record reflects that the trial court proceeded with the utmost caution and good faith by requiring each step of the proceedings to be properly transcribed and preserved and this transcript has been filed with the petition. The transcript discloses that on April 28, 1949, Frank M. Wilson, a nephew of petitioner and resident of the State of Washington, filed a petition for an order to restore petitioner to the status of a sane and competent person. After an extensive hearing, the court entered an order on April 29, 1949, which found: "That

the said Samuel H. Wilson, incompetent has been present in court during all of the time of this hearing and that neither he nor the attorney for Frank M. Wilson, Petitioner, has requested a jury to hear and determine the evidence; that after hearing all of the evidence, the court finds the said Samuel H. Wilson to be incompetent, that the fact of said incompetency is not doubtful and that it is not necessary to have a jury to inquire into said facts; that the said Samuel H. Wilson, incompetent, is at the time of this hearing incapable of conducting his own affairs and handling his estate, real and personal and that the petition herein should be denied."

After this unsuccessful attempt to have his sanity ordered restored, petitioner, on May 4, 1949, filed a motion to set aside the judgment of January 12, 1949, alleging the same grounds now urged for the issuance of the writ of prohibition. This motion was heard and overruled and the instant petition was filed May 13, 1949.

It is noted that the order of January 12, 1949, states on its face that petitioner was present in court at the time the order was made. The transcirpt of the proceedings discloses that while petitioner was in attendance on the court in response to the charge, the trial court heard most of the evidence in the absence of petitioner. This was done at the court's direction and to save petitioner from embarrassment.

After most of the testimony was taken, petitioner was brought before the court and questioned as follows: "The Court: Mr. Wilson, where do you want to make your home? A. Where do I want to make? The Court: Yes, where do you want to live? Do you want to stay on with Mr. and Mrs. Gullett? A. Well, I think so. The Court: All right, sir. Do you want the sheriff here to help you look after your finance? Do you want Sheriff House to help you look after your business affairs? A. Well, I don't know. I have never practiced hiring a man to run my business. The Court: How old are you sir? A. 82. The Court: How is your eye sight? Do you see all right? A. Oh, no. I couldn't tell you from looking at you now whether you are a white man or a

black man. The Court: Your vision has been bad for some time? A. Well, it is kinda hard—it has been about 5 years. Do you remember where you had a—let me get it straight now. Had a—had a—. I guess I don't know enough to tell it. The Court: Well, Mr. Wilson, do you have any relatives here in the State of Arkansas? Do you have any close relatives? A. Any kinfolks. I don't think so. The Court: Do you have any relatives that you regularly correspond with, write to and they write back to you? A. No, sir. The Court: What is your closest relative that you know of? A. I have got a sister two years older than me and she lives in—anyway in the west somewhere. I don't know just where it is. The Court: You don't actually know her address yourself? A. What? The Court: You don't actually know what her address is? A. No, I don't. The Court: Do you ever hear from her? A. Well, through somebody else. The Court: Do you ever visit with her? A. I ain't saw her for 65 years. The Court: You consider Perry County here to be your home? A. Well, I am going to other places right now, right away. The Court: Well, how long have you lived in Perry County? A. I don't know. The Court: I believe that is all. Dr. Gutowski: You had started home there, where were you going? A. Oh, I have been staying over here at Mr. Gullett's, and he stays there too and his sisters, two or three of them—two of them is there, I believe. The Court: Are you pleased to live there at Mr. Gullett's? A. Please too? The Court: Yes, sir. Do you like to live there? A. Well, if I was making more money, I would feel better about it. The Court: Well."

The transcript of the testimony taken at the hearing on Jan. 12, 1949, also shows that petitioner was an aged bachelor and had made his home with the Gulletts in Perry County for six years; that he carelessly kept nearly $30,000 in cash in a suitcase; and that he had started on a trip by bus to Missouri with the cash and other valuables at a time when he was mentally and physically ill and was apprehended by the sheriff of Perry County on information furnished by friends and neighbors of petitioner.

Petitioner insists that the proceedings in the probate court were void and that said court is attempting to proceed without jurisdiction because the statutory requirement of petitioner's presence in court at the sanity inquisition was not complied with. Ark. Stats. (1947), § 59-101, provides: "If any person shall give information in writing to the probate court that any person in their county is an idiot, lunatic, or of unsound mind, as in the preceding section (§ 57-401) is mentioned, and pray that an inquiry thereof be had, the probate court, if satisfied that there is good cause for the exercise of its jurisdiction, shall cause the person so charged to be brought before such court, and inquire into the facts by a jury, if the facts be doubtful." By Sub-division 3 of § 57-402 (Act 191 of 1945) it is provided that the requirement of the subject's presence before the court may be dispensed with where he "is physically incapacitated and is unable to be brought before the court by reason of physical disability, illness, or disease."

Petitioner relies on the case of Hyde v. McNeely, 193 Ark. 1139, 104 S .W. 2d 1068, and cases there cited. It was held in that case that an order of probate court declaring appellant insane, which failed to recite that she was present at the hearing, is void. Here the order of January 12, 1949, shows on its face the presence of the petitioner before the court. The transcript of the hearing also shows that petitioner was before the court and examined by the court although it further shows that he was not present throughout the proceedings. In view of the provisions of § 57-402, supra, we think the trial court is clothed with some discretion in determining whether petitioner's physical presence should be compelled at all times during the hearing. If the trial court abused its discretion in failing to enforce petitioner's presence throughout the hearing, this is merely an error in the exercise of jurisdiction which does not appear on the face of the judgment and must be corrected, if at all, by appeal.

In Sharum v. Meriwether, 156 Ark. 331, 246 S. W. 501, it was held (headnote 6): "Abuse by the probate court of its discretion in refusing a jury trial in an

inquisition as to sanity does not invalidate the proceedings and render the judgment void, but is merely an error in the exercise of jurisdiction, which may be corrected only by appeal." The abuse of discretion in that case appeared on the face of the judgment. See, also, Scherz v. Peoples National Bank, Guardian, 214 Ark. 796, 218 S. W. 2d 86.

The probate court had jurisdiction of the subject-matter in the instant case. Ark. Stats. (1947), § 57-401. We have repeatedly held that where a court has jurisdiction of the subject-matter and the existence or non-existence of jurisdiction of the person depends on a question of fact to be determined by the court, its decision that it has jurisdiction, if wrong, is an error which may be corrected by appeal and prohibition is not the proper remedy. Finley v. Morse, 74 Ark. 219, 85 S. W. 238; Macon v. Lecroy, 174 Ark. 228, 295 S. W. 31; Sparkman Hardwood Lbr. Co. v. Bush, 189 Ark. 391, 72 S. W. 2d 527; Ark. Democrat v. Means, 190 Ark. 948, 82 S. W. 2d 256; Twin City Lines, Inc. v. Cummings, Judge, 212 Ark. 569, 206 S. W. 2d 438.

Since we conclude that prohibition is not the proper remedy to review the alleged error in the court's failure to require petitioner's presence at all times during the inquisition, it is unnecessary to determine whether jurisdiction of the person was waived by the proceeding to restore sanity held on April 28, 1949.

Petitioner also contends that the sheriff of Perry County was prohibited by law from serving as guardian, and that the evidence is insufficient to support the finding of insanity. These are not questions affecting jurisdiction of the court, but involve mere errors which are properly reviewable on appeal and not by the extraordinary writ of prohibition.

The petition for writ of prohibition is denied.

GRIFFIN SMITH, C. J., not participating.

BRAMAN AND THE GUS BLASS COMPANY
v. WALTHALL.

4-8813 225 S. W. 2d 342

Opinion delivered May 30, 1949.

Rehearing denied June 27, 1949.

Frank J. Wills, for appellant.

Frances D. Holtzendorff, Ben D. Rowland and *Rose, Dobyns, Meek & House,* for appellee.

MINOR W. MILLWEE, Justice. Appellees, Myrna Walthall and Addie Allen, filed separate slander suits against appellants, Gus Blass Company and Don Braman. The original complaints also contained a second cause of action against appellants for restraint of liberty, but the trial court sustained appellants' motion to require appellees to elect, and the second counts were stricken as being improperly joined under § 1283 of Pope's Digest. The original complaints also made three other employees of Gus Blass Co. party defendants, but

appellees dismissed the suits as to two of these and took a non-suit as to the other.

The Gus Blass Co. operates a department store in the City of Little Rock with appellant, Don Braman as its store superintendent. Appellee Walthall entered the employ of the company as cashier in the piece goods department in April, 1945, and appellee Allen was employed as saleslady in the same department in April, 1946.

In their complaints appellees alleged that appellant Braman falsely and maliciously called them "liars", "thieves", "cheats" and "lying thieves" in the presence of each other and in the presence of other employees of the company; that said false and slanderous statements were made with the malicious intent to, and did, expose appellees to public hatred, contempt and ridicule; that said statements were spoken by Braman in an insulting, boisterous and contemptuous manner and by use of vile, obscene and profane language; that by reason thereof appellees suffered physical illness, mental anguish, embarrassment, humiliation and damage to their reputations for which they were entitled to recover both actual and punitive damages.

In their answers appellants objected to the jurisdiction of the court on the ground that the Workmen's Compensation Commission had sole jurisdiction. The answers, as amended, also contained a general denial and alleged the truth of the alleged slanderous statements, if made; that appellees conspired with each other to steal merchandise from the company; and that said slanderous statements, if made, were privileged.

The actions were consolidated for trial and resulted in verdicts and judgments for each of the appellees in the sum of $2,000 compensatory damages and $500 punitive damages.

Appellants first contend that the cases should have been transferred to the Workmen's Compensation Commission because the matters complained of arose out of and in the course of appellees' employment by the Blass

company. Appellants cite no authority to sustain this novel contention and we find it to be without merit. There is nothing in the Workmen's Compensation Law (Initiated Act 4 of 1948) indicating a repeal of our statutes on libel and slander (Ark. Stats. 1947, §§ 41-2401 to 2412). The act provides for compensation to employees for disability or death from accidental injury arising out of and in the course of employment or from occupational disease arising therefrom. We find nothing in the language of the act which could be construed as including slander or damage to character as furnishing a basis for compensation to employees.

It is also insisted that the evidence is insufficient to support the verdicts. According to the testimony of Mrs. Walthall she was called to Braman's office about 4:30 p. m., September 25, 1947, and told that she was $25.87 short in her cash receipts for September 23, the store being closed on September 24. She gave the following testimony as abstracted in appellee's brief: "The first thing he asked me was if I had a husband and I told him no. Then he started in. He kept me in the store until six o'clock—thirty minutes after closing time. He told me to be back at 9:00 in the morning. I asked him if he was accusing me of taking anything, and he just told me to come back in the morning to get my money. I couldn't get it then—it was all closed. I got in the store at quarter to nine Friday, September 26, and in about ten minutes from then I was in his office back there and he began on me. He had these tickets on his desk and I did not have anything to do with tickets. All I did was stamp tickets. I did not have a sales book. He said 'You took this money and you made a duplicate ticket, leaving off the two dates and putting on these other two. Therefore you stole $11.29, didn't you?' I said, 'No.' He said 'Myrna, don't lie to me.' I said, 'I am telling you the truth', and he called me everything in the world he could. He shook his finger at me and hit me so many times on the end of my nose until there is a mark there. He said I had taken material and I had stolen money from the store to the extent of $5,000. I kept telling him no. I was crying. I tried to leave. He grabbed me by the arm and

pushed me down and said I wasn't leaving. I wanted a drink. I was sick at my stomach. He ordered me not to leave the room—I was to sit there until he finished with me. My arm was black and blue. He would get right up and say 'You little lying thief, you are going to tell me or you are going to pay the price.' I kept telling him I didn't do it, I didn't know who did. He called Miss Cox and told her to start writing. He would stand over me and dictate to Miss Cox. I don't know what all was written. I wasn't permitted to read it. He said I would have to pay the $5,000. He said if I didn't sign the statement he would put me behind bars. He would ask me how I would look behind bars to my little girl to stare at. He picked up the phone to call the bonding company and I started crying harder. . . . He told me if I didn't sign he would follow me and I would be unable to get employment.

"I was afraid of him. He would grit his teeth at me. He called me everything. About 2:00 p. m. he allowed me to get a bowl of soup in the custody of Mrs. Beall. I wasn't allowed to use the telephone. He got up and said I was going to sign that statement. He took hold of my left arm and hit me on the knee with a file board. He said the bonding company would put me in jail. He picked up the phone and said 'Mr. Williams, you have a good case here. I have the goods on her and I want you to go the limit with her.' He was going to have me in jail within three minutes and my daughter could see me only through bars. I did not know the bonding company was in Memphis. He tried to make me say that I took a thousand dollars, then five hundred, and then three hundred. He shook his desk and said, 'Will you say you took anything?' And I said, 'No', and that is why he got so mad."

Mrs. Walthall testified that under these circumstances she signed the typewritten statement without being given an opportunity to read it; that Braman refused to permit her to consult an attorney or call her mother over the telephone; that he called her a thief and lying thief in the presence of three other employees;

that after she signed the typewritten statement, Braman directed two other employees to take witness to her home and search for materials; that said employees took from her home two skirts, a blouse and a few pieces of material, part of which had been purchased by her brother and presented to her as a Christmas present, and the balance of which she herself had purchased; that Braman sent down to her desk and got a box containing a sweater and dress, which she had just paid out of layaway for her daughter, some old shoes and glasses belonging to witness, and some material that had been ordered held for customers until called for; that Braman accused her of intending to walk out of the store with the box; that when she returned with the employees to the store, appellee Allen was in Braman's office and he called both of them lying thieves; that after dismissing Mrs. Allen, he told witness to write a statement in long hand, the contents of which he dictated and that she was forced to sign this statement after Braman used the same tactics that had been previously employed in obtaining the typewritten statement.

Mrs. Walthall further testified that after she signed the statement, Braman said it was no good and that he wanted something better. She was given some paper and told to take it home with her and write out a confession and bring it back the next morning. The following morning witness returned to the store with her brother and challenged Braman to make the same statements in the brother's presence that he had made the day before. When she asked for her check and the things that had been taken from her, Braman ordered her out of his office.

We do not set out the testimony of Mrs. Allen which tended to show the same method of treatment as employed in the case of Mrs. Walthall. Certain material was also taken from Mrs. Allen's home and she testified that she wrote out a statement under circumstances similar to those testified to by Mrs. Walthall. Mrs. Allen's 16 year old daughter who was employed on weekends identified part of the material taken from her

mother's home as having been purchased by her for herself and mother. Both appellees denied that they had ever stolen anything from the store.

A doctor who examined appellees on September 29, 1947, testified that he found them in a nervous, weak and upset condition and that he found two bruises on the right arm of Mrs. Walthall.

Appellees testified of several instances after being discharged by appellants in which they failed to obtain employment after Blass was given as a reference, and of losing jobs obtained without such references after the employer learned of their former employment by Blass.

The testimony on behalf of appellants contradicted that on behalf of appellees on all the material issues. If the jury had believed such evidence, it would have been warranted in finding that the slanderous statements attributed to Braman, if made, were true and made in good faith and without malice; and that appellees made voluntary confessions establishing the truth of the alleged slander. Appellants point out certain discrepancies in the testimony on behalf of appellees and certain evidence offered by appellants which strongly supports their contention on the facts. This evidence does not rise to the dignity of undisputed physical facts so as to warrant this court in setting aside the verdicts. We do not try the issues *de novo* and under our established rule the verdicts must be upheld if, when viewed in the light most favorable to appellees, there is any substantial evidence to support the jury's determination of factual issues. Waters-Pierce Oil Co. v. Knisel, 79 Ark. 608, 96 S. W. 342; C. R. I. & P. Ry. Co. v. Manus, 193 Ark. 397, 100 S. W. 2d 258.

Appellants also contend that the evidence is insufficient to support the verdict because the statements of Braman were made while acting within the scope of his employment as manager of the store to an employee and were reasonably necessary under the circumstances and, therefore, qualifiedly privileged in the absence of express malice which, they insist, has not been shown. In

the recent case of Arkansas Associated Telephone Co. v. Blankenship, 211 Ark. 645, 201 S. W. 2d 1019, we said: "In the case of Sinclair Refining Co. v. Fuller, 190 Ark. 426, 79 S. W. 2d 736, this court approved the following statement from Newell, Slander and Libel, (Fourth Ed.) p. 450: 'A defamatory communication when necessary to protect one's own interest is privileged, when made to persons who also have a duty or interest in respect to the matter. In such case, however, it must appear that he was compelled to employ the words complained of. If he could have done all that his duty or interest demanded without libeling or slandering the plaintiff, the words are not privileged.' In the same case this court also approved the rule stated in 36 C. J., p. 1248, as follows: 'The protection of the privilege may be lost by the manner of its exercise, although the belief in the truth of the charge exists. The privilege does not protect any unnecessary defamation. In order for a communication to be privileged, the party making it must be careful to go no farther than his interest or his duties require. Where the party exceeds his privilege and the communication complained of goes beyond what the occasion demands that he should publish, and is unnecessarily defamatory of plaintiff, he will not be protected, and the fact that a duty, a common interest, or a confidential relation existed to a limited degree is not a defense, even though he acted in good faith.' "

Appellants rely on the case of Bohlinger v. Germainia Life Ins. Co., 100 Ark. 477, 140 S. W. 257, which involved libel. It was there said: "If the statements are published by one in good faith to another in order to protect his own interest or to protect the corresponding interest of the other in the matter in which both parties are concerned, then such statements are privileged when the subject-matter of the publication makes it reasonably necessary under the circumstances to accomplish the purpose desired. Newell on Defamations, Slander and Libel, (2 Ed.) p. 388; 18 A. & E. Enc. Law, 1037; King v. Patterson, 49 N. J. Law, 419; Rotholtz v. Dunkle, 53 N. J. L. 428, 20 Atl. 193, 26 Am. St. Rep. 432, 13 L. R. A. 655; Holmes v. Clisby, 121 Gr. 241, 48 S. E. 934, 104

Am. St. Rep. 103; Montgomery v. Knox, 23 Fla. 595, 3 So. 211; Allen v. R. R. Co., 100 N. C. 397, 6 S. E. 105; Briggs v. Garrett, 111 Pa. 405, 2 Atl. 513, 56 Am. Rep. 274. But the communications containing defamatory statements thus made should not, in any event, go beyond what the occasion required. If it is shown by the writing itself, or by evidence outside of the communication, that the occasion therefor was abused, or that the statements were not relevant to or went beyond the subject-matter or purpose of the agency or business, or that the statements were made from malice proved, then no protection will arise against the prosecution of an action for libel, although there may exist a common interest or duty of the parties between whom the communication passes. Such intrinsic or extrinsic evidence would show a want of good faith, and would repel the inference that there was no malice . . . " The court further said that if, from the uncontroverted testimony, there is no malice shown, it then becomes the duty of the court to direct a verdict for the defendant.

In Gaines v. Belding, 56 Ark. 100, 19 S. W. 236, the court said: "Where the words spoken are actionable *per se, prima facie* the law implies malice, and the jury can award compensatory damages only, but cannot award exemplary or punitive damages, without proof of express malice. Whether there was express malice, was a question of fact for the jury. Malice may be shown by the defamatory words themselves and the manner of their publication, and need not be proven by extrinsic evidence. The absence of legal excuse for publishing the slander is evidence of malice. Express malice may be inferred from all the circumstances of the case, but it is not to be inferred from the facts alone that the words are false and injurious to the plaintiff, although an implication of malice arises from these facts that will warrant compensatory damages . . . Where actual ill will or express malice is shown, the jury may give exemplary or vindictive damages, the amount of which it is their province to determine, under proper instructions from the court." See, also, Stallings v. Whittaker, 55 Ark. 494, 18 S. W. 829; Newell, Slander & Libel (4th Ed.) § 277.

When the highly controverted testimony in the case at bar is considered in the light of the rules above announced, we think the questions whether Braman was acting in good faith or was actuated by actual malice in making the statements attributed to him by appellees, and whether he went beyond what his interest or duty required, were properly for the jury. On the whole case the evidence was substantial and sufficient to support the verdicts and the trial court did not err in refusing to direct verdicts for appellants.

When Mrs. Walthall testified that appellant Braman shook his finger at her and hit her on the nose so many times that a mark was left, appellants objected to the testimony on the ground that there was no allegation of physical violence in the complaint. The court limited the jury's consideration of this testimony to the issue of malice. Mrs. Walthall later testified to further instances of Braman laying rough hands on her without any objection to such testimony. While the complaints do not allege physical violence, they do allege malice. We think this evidence was competent for the limited purpose for which it was offered and that no error was committed in so admitting it.

Error is assigned in the refusal of the court to give appellants' requested Instruction No. 6 which would have told the jury as a matter of law that appellees were not entitled to punitive damages. Since we have previously indicated that there was sufficient evidence of express malice to go to the jury, there was no error in the refusal of this instruction.

It is next argued that the court erred in giving appellees' requested Instruction No. 1 because it did not require the jury to find publication of the slander. The instruction reads: "If you find from the preponderance of the evidence that the defendant Braman used the words set out in the complaint to the effect that the plaintiffs were guilty of a crime or crimes, then the plaintiffs are entitled to recover compensatory damages from both defendants unless you should further find from a preponderance of the evidence that plaintiffs were

guilty of the crime charged, or unless you find that the use of such words was privileged as hereinafter defined."

The complaints of appellees alleged that the slanderous statements were used in the presence of appellees and other employees who were named. We find it unnecessary to determine whether the word "used" is synonymous with "publish" and its use, therefore, sufficient to meet the objection of appellants. While Braman testified that he asked appellees "a thousand times" to tell the truth, he did not deny that he accused them of taking property from the store or that he made statements to that effect in their presence. The evidence on behalf of appellees as to publication of the alleged slander appears to be uncontradicted and we have frequently held that it is not necessary to submit to the jury an issue established by undisputed evidence. Pacific Life Ins. Co. v. Walker, 67 Ark. 147, 53 S. W. 675; Aetna Life Ins. Co. v. Dewberry, 187 Ark. 278, 59 S. W. 2d 607; George v. George, 191 Ark. 799, 88 S. W. 2d 71.

In this connection the court gave appellees' requested Instruction No. 8, as follows: "Publication of slander is the utterance of slanderous words whether in the presence of the person slandered and one or more other persons, or the utterance of such words to any other person or persons in the absence of the person slandered. It is not necessary that the slanderous words should be made known to the public generally, or even to a considerable number of persons. It would be sufficient publication if the slanderous words complained of were addressed to the plaintiff, Mrs. Walthall, in the presence of the plaintiff, Mrs. Allen, or were addressed to the plaintiff, Mrs. Allen, in the presence of the plaintiff, Mrs. Walthall." This instruction correctly states the rule set forth in 33 Am. Jur., Libel & Slander, § 96, as follows: "It is not necessary in matters of libel or slander that the defamation be made known to the public generally, or even to a considerable number of persons. It is sufficient if it is communicated to only one person other than the person defamed, and such a publication suffices even though such person does not believe what is said of the

person defamed, at least when the words are uttered maliciously. It has been said that this is true because the injury to the reputation of the plaintiff is not the sole element of injury; the jury has a right to consider also the mental suffering of the person slandered. Another reason is that in the case of defamations which are actionable *per se,* injury is conclusively presumed."

Appellants also contend that error was committed in the giving of appellees' requested Instruction No. 5 because it omitted the defense of privilege and did not require publication. This instruction dealt with burden of proof as to the truth of the slander and the presumption of good character, reputation and innocence of crime. It was not a binding instruction and is not open to the objections made. The defense of privilege was fully covered in other instructions given by the court.

It is finally insisted that the verdicts are excessive. The evidence on behalf of appellees was sufficient to show that they suffered physical illness, humiliation, mental anguish, embarrassment and loss of subsequent employment on account of the slanderous statements of appellant, Braman. It is true that the evidence in this connection is more favorable to Mrs. Walthall than to Mrs. Allen. Under our decisions we may not set aside the verdicts as being excessive unless we can say the jury was actuated by prejudice, passion or corruption in fixing the amount of damages. In the following cases verdicts were sustained for similar or greater amounts than in the instant case under facts somewhat similar to those presented here. Gaines v. Belding, supra; Safeway Stores, Inc. v. Rogers, 186 Ark. 826, 56 S. W. 2d 429; Sinclair Refining Co. v. Fuller, 190 Ark. 426, 79 S. W. 2d 736. We conclude that the verdicts are not excessive.

We find no prejudicial error in the record and the judgments are accordingly affirmed.

GRIFFIN SMITH, C. J., dissents.

GEORGE ROSE SMITH, J., not participating.

GRIFFIN SMITH, Chief Justice (dissenting). Insofar as abstract facts are concerned, the department

store's merchandising methods, and the administrative policies and customs in effect while appellees were employed, are fairly stated in appellant's brief. The majority opinion, pursuant to a judicial custom of stating the facts in a manner most favorable to conclusions reached by a jury, does not detail testimony the Blass Company has emphasized, nor are written confessions set out.

It is my view, therefore, that a clearer understanding of the controversy can be had by showing what the appellants relied upon, since good faith in making the investigation was claimed upon the one hand and denied upon the other.

The preliminary statement by Frank J. Wills, counsel for Don Braman and The Gus Blass Company, is copied. I think, first, that testimony did not preponderate in favor of the plaintiffs, and it became the trial Court's duty to set the verdicts aside. However, on review, we determine only whether there was substantial evidence of actionable misconduct. If in examining the appeal we are compelled to accept as substantial the wholly unreasonable and patently contradictory statements of appellees,—(and it must be remembered that as interested parties their testimony could not be treated as uncontradicted)—still, I think a rational construction of the investigations made by Braman is conclusive of the proposition that he meticulously refrained from giving unnecessary publicity to the transactions, and nothing not required by careful conduct was done to embarrass the parties.

The factual statement from appellants' standpoint is as follows:

"Abnormal inventory shortages had been evident in the Blass Co. piece goods department for more than a year. Appellee Walthall was cashier and appellee Allen was a saleslady in that department, each having been so employed for many months.

"Appellee Walthall, on September 26, 1947, admitted in writing that she had taken in excess of $14.00 in money and a large amount of merchandise from the store without payment. She went to her home with

Evelyn Cox and Margaret Beall where the merchandise was recovered.

"On September 26, 1947, appellee Allen admitted in writing that she had likewise taken a large amount of merchandise. She went to her home with Miss Cox and Mrs. Beall where the merchandise was found.

"A few weeks later, appellees filed separate suits for slander, alleging the Blass Company and Braman called them liars, thieves, cheats, and lying thieves while they were employees of the Blass Company.

"To appreciate how the matters leading to these causes arose, it is necessary to know the method of making cash sales at the Blass Company and the internal control thereof, which is as follows:

"1. Each cashier has a specific identifying mark which is stamped on each cash sales ticket handled. Mrs. Walthall's was a number "1" in a circle. Each cashier begins the day with a certain amount of "bank money" with which to make change.

"2. Separate cash sales books with specific identifying serial numbers on each sales slip therein are issued to salespersons, who must use the books charged to them.

"3. When making a cash sale, the salesperson uses the next consecutive numbered ticket in her book and shows: (a) Number of the department (b) Identifying number of the salesperson (c) The total amount of money or check received (d) Detail of items sold with the total amount of sale and tax.

"4. The salesperson herself, or a sales assistant, takes the merchandise, money and orginal sales ticket to the cashier, who stamps the ticket, puts the money in her separate cash box and makes change, puts the original ticket on her spindle and gives the salesperson a perforated portion of the ticket with the same identifying number thereon, which acts as a claim check. The cashier hands the merchandise to the bundle wrapper who delivers the wrapped merchandise in exchange for the claim check, which is to be held for 30 days.

"5. The sales audit department picks up from each cashier every hour or so during the day, all cash sales

tickets, checks the extensions and additions, sees that each ticket is accounted for in numerical order from each salesbook, and enters the total on a control sheet for each cashier. All errors in extension and addition must be okayed by the department head.

"6. At the end of the day, each cashier counts her cash, including her "bank money" and turns it in to the general offices on the fourth floor with her report. The next morning, the cash is verified by the general office with the report from each cashier, and the net amount of cash sales turned in to the general office should balance with the controls over each cashier that have been maintained by the sales audit department.

"7. Prior to the events that resulted in this litigation, the unused portions of sales books of salespersons who left the employ of the Blass Company were not checked in by the auditing department, but were left on a ledge near the cashier's desk.

"Appellee Walthall's cash for Monday, September 22, 1947, balanced. The next day it was short $25.87, but this shortage was not discovered until the following Thursday, the store having been closed for the intervening day.

"On Thursday, September 25, 1947, when the general office report of the net cash sales turned in by Mrs. Walthall was shy $25.87 of the sales audit control over her cash sales for Tuesday, an auditor telephoned her to ask if she had misplaced a check or money order, there having been a cash sale in her work for Tuesday for $25.87, which showed a check had been received in payment. Within a short time, Mrs. Walthall asked if the outage was on clerk No. 787 (Mrs. Viar). When told it was, she asked if her shortage was around $25.00. Up to this time, the auditor had not told her whether her cash was over or short, or the amount of the outage. Mrs. Walthall then told the auditor that clerk 787 had a sales book with two identically numbered tickets, and one of them should have been voided and must have gotten into her Tuesday's work in error. The auditor then asked her to get the customer's claim checks for

the two identically numbered sales tickets but was told neither of them could be found.

"On that Thursday morning, the sales audit department delivered to appellant Braman, sales ticket with printed number 2410-25 for $25.87 from Tuesday's business and ticket with hand-written number 2410-25 for $11.48 from Monday's business. Both tickets bore Mrs. Walthall's stamp with a number (1) in a circle. He called Mrs. Walthall to his office, showed her the tickets, and asked what she knew about them. She said the $25.87 ticket should have been voided because the customer was annoyed at the delay in getting her check okayed by the credit department and decided to take only the first item listed on the sales ticket, a new ticket for the lesser amount of $11.48 was made and the $25.87 ticket should have been voided.

"Having procured from clerk No. 787 the name and address of the $25.87 customer, Braman telephoned Mrs. Kontsonkos at Hot Springs and learned she had received all the merchandise for which she issued her check to the Blass Co. for $25.87.

"On Friday morning, when told the customer had taken the full $25.87 sale, Mrs. Walthall admitted that on the day of that sale, she had taken a ticket from a discarded sales book, torn off the printed number and substituted in pencil the number 2410-25, recorded a $11.48 sale, and had pocketed the difference of $14.39 to apply on a dentist bill for one of her children. She had intended to destroy the $25.87 ticket but it got into her work for Tuesday. Had she destroyed this $25.87 ticket, her cash would have balanced for Tuesday and this method of diverting sales receipts from the Blass Co. would not have been discovered. When it got into her work for Tuesday, she was short that day the exact amount of $25.87.

"When Mrs. Walthall said she was ready to tell the truth about the whole matter, Miss Cox was called to take her statement in shorthand, which was done in the presence of Margaret Beall. Braman went about his work and returned in about half an hour and had Miss

Cox read back her notes in the presence of Mrs. Walthall. He then asked a few questions which Mrs. Walthall answered, which were taken in shorthand by Miss Cox. Miss Cox then began transcribing her notes in an adjoining office.

"Mrs. Beall had brought to Braman's office, two tied up suit boxes full of things from Mrs. Walthall's desk. They contained some shoes, letters, and many pieces of merchandise. Of this merchandise, Mrs. Walthall said the black material was for a slip for herself and for Mrs. Allen, three pieces of blouse material were for herself, and she had intended to take both boxes home with her.

"When Mrs. Walthall and Mrs. Beall returned from lunch, Miss Cox had completed transcribing her notes. The statement was handed to Mrs. Walthall who read it and then signed it in the presence of Braman, Miss Cox and Mrs. Beall. The substance of the statement is as follows:

" 'I forged the ticket and pocketed the $14.59. About six months ago, Mrs. Allen and I began a plan whereby Mrs. Allen would cut off certain materials for herself and for me without making sales tickets or payments. I put the materials in sacks and delivered those of Mrs. Allen to her son, Jerry. I had secreted mine in a house package and have a box full at home I got that way. Of the goods I intended to take home today, the tan wollen was cut for me by Mrs. Allen about three weeks ago. The black silk material was cut by Mrs. Allen for herself only yesterday. Mrs. Allen intended to pay for the black tube dress. A refund had been written for the green dress but it did not go back in stock. The blue material was returned yesterday but I did not want it. I paid for the satin material and pattern on pay day; bought the shoes at the basement sale for $1.00; these items I intended to take home and the box of materials I have at home are all I have taken. The box at home contains some gingham, several pieces of blouse material and maybe a skirt.

" 'I never took any money from my cash box except on that one ticket No. 2410-25. It is all right for Mrs.

Beall to go to my home and bring back the merchandise. I have admittedly taken from the Blass Co.'

" 'A fuchia blouse has been made up for me but I bought the childrens' clothes in lay away. I will show you exactly what I have taken when you go to the house with me. I never gave anyone a piece of material over that desk except Mrs. Allen. The gross amount I have taken won't be $200.00.'

"When Mrs. Walthall arrived at her home with Miss Cox and Mrs. Beall, she went directly to her closet and handed them a box of materials she said she had taken from the store without payment. The list of these 12 items totaling $35.95 is at page 355.

"When they returned from Mrs. Walthall's home, Braman was interviewing Mrs. Allen. Mrs. Walthall was given some paper and asked to write another statement, which she did in the training room which is about three offices from Braman's. The original of this statement is at page 353 and the substance is as follows:

" 'About February, Mrs. Allen cut off some gingham and asked me to hold it for her and one of her kids would be up to take it out for her, which I did. She also cut some blouse material for me and the next time I bought something, I took the blouse material home in a house package. The material I have at home and what is in the desk is all I've had cut off.

" 'The other day I got a statement from the dentist saying he was turning my account over to the credit bureau if I didn't pay it. I got a ticket and made a duplicate, leaving off two items and took the $14.59 to pay the dentist. This is the first time I ever did this.'

"The substance of Mrs. Allen's statement which is wholly in her own handwriting, is as follows:

" 'For the past year and a half I have cut off materials for Myrna and myself but do not know how much. I also know Mrs. Lee carried out material for Myrna and cut it off for her, but I do not know how much. As far as I can recollect, the following is all I took. (7 items totaling $26.06 are then listed in detail.) During the

style show, a lot of material was taken from the department without any accounting.

" 'About the black material, Myrna said her mother would make each of us a slip and 3½ yards would make two slips, so I cut the 3½ yards off.'

"Mrs. Allen also agreed Miss Cox and Mrs. Beall could go to her home with her to get the materials she admittedly had taken without payment. Mrs. Allen did not return to the store when they brought back the 6 items totaling $26.00.

"Mrs. Allen went to her lawyer on Saturday, September 26, and never did go back to the Blass Co. to claim any of the materials recovered from her home.

"On that same Saturday, with her boy friend, Mr. Metrailer, and her brother, Vance Mason, Mrs. Walthall called on Braman. She was excited and her brother asked her and Metrailer to leave the office, so he could talk with Braman. Braman gave Mason the personal things his sister had packed in the two suit boxes, except the merchandise she had admitted belonged to the Blass Co. Braman told Mason he was turning the matter over to the bonding company, understood they did not want their mother to know about it, and it might be worked out by Mrs. Walthall paying a little every week on the shortage. Mason was to talk further with his sister and report back to Braman, but he did not return.

"After completing its independent investigation, the bonding company paid the Blass Co. a $2,500.00 settlement for the inventory shortages in the piece goods department.

"Appellees Walthall and Allen had various temporary jobs through the end of 1947. In the early part of 1948, Mrs. Walthall obtained a position with a bank in Little Rock and Mrs. Allen obtained one with U. S. Time Corporation. Both of them were so employed at the time of the trial at better jobs than they had with the Blass Co.

"Neither appellee denied signing the statements, but both testified they wrote only what Braman dictated.

They could not explain how Braman could describe the various pieces of materials referred to in their statements as being in their homes, nor could Mrs. Allen explain why she had given in her statement as one of the causes of the inventory shortages, her explanation that much unrecorded material was used in the style show. Over appellants' objections and exceptions, they were permitted to testify that Braman used physical force and violence to their persons while interviewing them, notwithstanding no allegations to that effect were contained in either complaint on the slander counts.

"Mrs. Whitehall testified she was called a liar and thief in the presence of Miss Cox, Mrs. Beall and another employee who was in and out of Braman's office. Mrs. Allen testified she was so slandered only in the presence of Mrs. Walthall and her character and reputation were not damaged thereby. Appellants' requests for a verdict in their favor in each case were denied over their objections and exceptions.

"Verdicts for $2,000 actual and $500 punitive damages to each of the appellees were signed by nine of the jurors."

SOUTHERN FARMERS MUTUAL INSURANCE COMPANY *v.* MOTOR FINANCE COMPANY.

4-8832 222 S. W. 2d 981

Opinion delivered March 28, 1949.

Rehearing denied April 25, 1949.

Shaver, Stewart & Jones, for appellant.

F. B. Clement, for appellee.

FRANK G. SMITH, J. This is a suit to recover on a policy of insurance against upsets and other hazards. A premium of $67.47 was paid for the insurance, the return of which was tendered in the answer which denied liability, upon the ground that the insured, Hendrix, was not the sole owner of the car as stated in the policy, and that the car had been stolen.

It was stipulated that the automobile was destroyed in an upset collision, while being driven by Hendrix, and that its value at that time was $1,000. The car appears to have had a salvage value notwithstanding this stipulation.

Hendrix purchased the car from the F & F Motor Company of Nashville, Arkansas, and received a duplicate of the contract of sale which recited that the purchase price was $995.05, of which $400 was paid in cash, and a note for the balance was given. The note and the contract of sale reserved the title until the purchase money was fully paid. The note and contract were assigned by the F & F Motor Company to the Motor Finance Company, Inc., which latter company required Hendrix to insure the automobile and the policy here sued

on was issued to Hendrix and the Motor Finance Company, Inc., as their respective interests might appear.

The claim for insurance was delivered to J. C. Morneau, an insurance adjuster, for settlement, who discovered on investigation that the motor number of the car did not correspond with the motor number stated in the policy. Morneau told Hendrix he would proceed with the settlement subject to the approval of the insurance company as to the difference in motor numbers. Morneau took the wrecked car to the J. W. Finley Garage at Texarkana for its salvage value. This was done by agreement between Morneau and Hendrix, or at least without objection. Several days later a representative of Agricultural Ins. Company of Joplin, Missouri, appeared and was given possession of the car, and removed it. It was not shown that anyone objected to this action. Morneau did not know where the car was taken, but the Agricultural Ins. Company carried it away. Max Tackett testified that he was an investigator for the State Police, and that it was his duty to search for stolen automobiles, and in the discharge of this duty he investigated cars in the possession of second-hand dealers. He inspected and checked 126 cars in the possession of the F & F Motor Company, and when he found that the motor number of the car in question was not that stated in the policy, he communicated with the Automobile Underwriters Bureau of Atlanta, Georgia. This is an agency that assists in locating stolen cars. This agency discovered from its records that the car in question had been stolen in Joplin, Missouri. Tackett testified that there was no bulletin on the car.

It was ascertained that the owner had insured this car against theft with the Agricultural Ins. Co. of Joplin, Missouri, and that insurance company paid the insured the amount of his policy, and upon this claim of title took the car from the possession of the Finley Garage.

The car had been driven from Joplin to Lockesburg, Arkansas, and sold to one Welch, a store keeper, and he sold it to Fletcher Webb, who operated a garage at Glenwood, and Webb sold the car to F & F Motor Com-

pany. It was not claimed that Welch, Webb or the F & F Motor Company were aware that the car had been stolen, and it was expressly conceded that their purchases "were on the level," that is, without knowledge that the car had been stolen.

This suit was brought by Hendrix and the Motor Finance Company, Inc., as assignee of the contract of purchase, and as has been said, was defended upon the ground that Hendrix was not the sole owned of the car, as the policy of insurance stated him to be.

The instructions in the case cannot be reconciled. Those on the part of the plaintiffs were to the following effect. It was essential only that Hendrix have an insurable interest in the car, and he had that interest if he would be benefited by the continued existence of the car and would suffer a direct pecuniary loss by its destruction. The jury was instructed that the statement as to the ownership of the car contained in the policy was a mere representation and that its falsity, if false, would not defeat the recovery unless Hendrix knew it was false or was chargeable with such knowledge. This instruction in effect directed a verdict for the plaintiffs as no contention was made that Hendrix was aware that the car had been stolen.

On the other hand the jury was instructed that if the automobile was a stolen car and not the property of Hendrix, a verdict should be returned in favor of the insurance company. The jury was further instructed that all property obtained by larceny shall be restored to the owner, and that no sale, whether in good faith on the part of the purchaser or not, shall divest the owner of his right to such property. This last instruction is a copy of § 1292 of Pope's Digest, and the court gave as an instruction the following section of Pope's Digest, No. 1293, which reads as follows: "Any person losing property or any valuable thing by larceny, robbery or burglary may maintain his action, not only against such felon, but against any person whatsoever in whose hands or possession the same may be found."

One of the leading cases on the subject of insurance issued upon a stolen car is that of *Hessen* v. *Iowa Auto-*

mobile Ins. Co., 195 Ia. 141, 190 N. W. 150, 30 A. L. R. 657. This case contains a review of the leading cases on the subject and is extensively annotated in 30 A. L. R. 657. Supplements to this annotation appear in 38 A. L. R. 1123 and 46 A. L. R. 657.

This case held upon a review of many other cases that an insurable interest was essential to the validity of a policy of insurance and that a title or interest to a car acquired through theft did not constitute an insurable interest although the car had been purchased by the insured in entire good faith without knowledge that it had been stolen.

It was said in Blashfield's Cyclopedia of Automobile Law and Practice, Vol. 6, § 3503: "While it has been held on the one hand that the *bona fide* possession of a stolen vehicle does not give the holder any sort of title such as will measure up to the requirements for an insurable interest, elsewhere a purchaser in good faith of an automobile for a valuable consideration, who is in undisputed possession of it, has an interest therein sufficient to enable him to recover on a policy insuring it, issued to him while in such possession, despite its having been stolen from the original rightful owner."

The case of *Barnett* v. *London Assurance Corp.*, 245 Pac. 3, 138 Wash. 673, 46 A. L. R. 526, is cited as authority for the text last quoted. This is one of the cases cited in the supplemental annotation on the subject in 46 A. L. R. 526.

In this Barnett case, *supra,* the Supreme Court of Washington said: "Even thought the automobile may have been originally stolen from the rightful owner, the respondent had the title and the right to possession of it as against all the world, except the rightful owner, assuming that the car had been stolen from him. In *Norris* v. *Alliance Ins. Co.,* 1 N. J. Misc. 315, 123 Atl. 762, it was held that, where the insured was the *bona fide* purchaser of an automobile on which the policy of insurance against theft was issued, his title was good against every one but the original owner, and that in an action upon the policy the insured had a right

to recover for the theft of the car from him, even though originally it had been stolen from the rightful owner."

The New Jersey case above cited is relied upon by appellee for the affirmance of the judgment in the insured's favor, but the Washington court further quoted from the New Jersey case as follows: "It was there said: 'The defendant's difficulty is that there is no proof that the insured machine was stolen from its original owner, but, if this be granted, plaintiff's title was good against every one but the true owner, and he is unknown and makes no claim of ownership, and plaintiff has never been evicted. He owned it against all the world but a supposed owner, from whom we are to infer it was stolen. None but he can assert ownership against the plaintiff, which he does not do, and defendant has no right to do it for him. The plaintiff did not, knowingly, make any false representation to defendant as to his ownership; he supposed he was the unconditional and sole owner without any fact known to him to the contrary, and so far as this record shows, was, and is, the only person claiming ownership. So far as defendant is concerned, it is the same as if the automobile had been lost and found by plaintiff, who is the true owner, until evicted by one holding better title. The possession of property is *prima facie* proof of title.' "

Here there is proof, largely hearsay, that the car in suit had been stolen from the original owner who is known, and who not only made a claim of ownership but actually recovered possession of the stolen car, and so far as the record discloses this was done without objection.

It is true that the original owner is not a party to this litigation, but there was no occasion for him to intervene and assert his title, for the reason that his insurer, who had paid him the value of the car, asserted title thereto by way of subrogation and took possession of the car, apparently, as has been said, without objection. There was no occasion for the original owner, or the insurer, to intervene as the insurer by subrogation has the possession of the car and this right to possession is not called into question. The New Jersey case, which

the Washington case followed, is therefore not applicable, because the true owner's title was asserted and is not questioned in this lawsuit. In the chapter on Automobiles, 5 Am. Jur., § 514, p. 794, it is said: "Automobile insurance policies frequently contain provisions to the effect that the policies shall be void if the interest of the assured is other than that of an unconditional and sole owner. A purchaser of a stolen car does not have sole and unconditional ownership. The question whether the ownership of a chattel mortgagor or mortgagee, or conditional buyer or seller, is sole and unconditional is discussed at another point."

If the undisputed testimony showed that the car had been stolen from and recovered by the original owner we would reverse the case and dismiss it, but the evidence of that fact is largely hearsay and was incompetent for that reason. Nor do we know that the jury found that the car had not been stolen. Under the instructions of the court the jury could have found, in fact would have been required to find, in favor of appellees, although the car had been stolen, as it is undisputed that Hendrix was an innocent purchaser.

The judgment will therefore be reversed and the cause remanded for a new trial, and the jury directed to determine whether, according to a preponderance of the testimony, the car had in fact been stolen from the original owner and surrendered to his possession, and if so, to return a verdict for the defendant.

Justices McFaddin and Millwee dissent.

Ed. F. McFaddin, Justice (Dissenting). The concluding paragraph of the majority opinion reads: "The judgment will therefore be reversed and the cause remanded for a new trial, and the jury directed to determine whether, according to a preponderance of the testimony, the car had in fact been stolen from the original owner and surrendered to his possession, and if so, to return a verdict for the defendant."

I think the judgment of the Circuit Court should be affirmed because, as I see it, the question of the original theft of the car is a matter entirely immaterial in this

case. I cannot bring myself to agree that the unconditional ownership clause in the insurance policy should be allowed to defeat recovery in a case such as was here developed.

Hendrix purchased the car for its full value and in good faith from a reputable automobile dealer. Hendrix insured the car and was in possession at the time of the loss. No question of his ownership or title had ever been raised prior to the time the car became a loss and the claim was filed against the insurance company. While the adjustment of the claim was pending it developed that the car had been stolen before it was sold to the dealer, who resold it to Hendrix. But at the time the car was damaged and the insured loss occurred, the theft of the car was as unknown to the dealer and Hendrix as it was to the insurance company.

The unconditional ownership clause in an insurance policy is designed to prevent corruption and overreaching. Here, the insurance company is being allowed to hide behind the unconditional ownership clause and thereby accomplish an overreaching. What was designed as a shield against oppression is being converted into a sword to effect oppression. To review the authorities contrary to the majority holding herein would only serve to lengthen this opinion. They are listed in the various A. L. R. Annotations mentioned and referred to in the majority opinion. I agree with the statement in Blashfield's Cyclopedia of Automobile Law and Practice, Vol. 6, § 3503: ". . . a purchaser in good faith of an automobile for a valuable consideration, who is in undisputed possession of it, has an interest therein sufficient to enable him to recover on a policy insuring it, issued to him while in such possession, despite its having been stolen from the original rightful owner."

The conclusion of the whole matter is that the majority is allowing the unconditional ownership clause in the policy to work an injustice rather than to prevent injustice. I therefore respectfully dissent, and I am authorized to state that Mr. Justice MILLWEE joins me in this dissent.

BIRD *v.* KITCHENS.

4-8839 221 S. W. 2d 795

Opinion delivered May 16, 1949.

Rehearing denied June 27, 1949.

Keith & Clegg and *Gaughan, McClellan & Gaughan,* for appellant.

Hampton Kitchens and *Wilson & Kimpel,* for appellee.

HOLT, J. February 14, 1933, R. S. Warnock secured a judgment in the Columbia Circuit Court for $9,945.60 against Wade Kitchens and J. B. Wilson on a joint note, signed by each, the judgment being against them as individuals.

November 10, 1933, Warnock died and his son, R. S. Warnock, Jr., was appointed administrator of his estate.

On June 2, 1936, after the lapse of more than three years, execution was issued on the judgment against Kitchens and Wilson, advertising for sale a number of tracts of land, some of which belonged to Kitchens individually, some to Wilson individually, some to them jointly, and some few tracts that neither owned were erroneously included. All the lands included in the sale in which either Kitchens or Wilson had an interest were mortgaged. The lien of the judgment had expired February 14, 1936.

For the purpose of the sale, the lands were grouped and sold by the Sheriff in four different lots. Alvin Rogers was the successful buyer, paying $500 for one lot, $1,000 for another, $1,250 for another and $2,000 for the other, or a total of $4,750. These sales began before three p. m. and concluded shortly after that hour. The sales did not divest Kitchen's wife of her dower interest.

Kitchens knew about the sale, but was not present in person. He, however, sent his secretary, Miss Stevens, to make notes on the sale and to report proceedings to him.

For some time prior to the sale Wilson and Kitchens had become estranged and were not on speaking terms, but Wilson, through emissaries, had contacted Kitchens in an effort to save their property from being sold. Kitchens refused to negotiate or take any part in the matter.

In the forenoon on the day of the sale, Wilson entered into an agreement with the administrator, Warnock, to purchase the judgment. In effect, this agreement

provided that Wilson might acquire the judgment at a discount, for $9,500, on condition, however, that the judgment in so far as it effected Wade Kitchens, should be assigned to a nominee of Wilson. Accordingly, Wilson paid the administrator $2,500 in cash, the balance to be paid in 15 days in settlement of the judgment. The Administrator, Warnock, agreed to instruct the sheriff to sell, under the execution, only lands, levied upon, belonging to Kitchens. The sheriff carried out these instructions in accordance with the agreement and sold only the Kitchens' lands, for a total of $4,750, the amount Kitchens owed as his part of the judgment. As above noted, Wilson had paid $2,500 and was personally liable for the remainder of the $9,500. On this balance due, Wilson would owe as his part $2,250, the difference between $4,750 and $2,500. Shepp Beene advanced to Wilson $5,000 and as security took an assignment of the judgment. Wilson secured $2,000 additional from another source and paid off the judgment. Thereafter, April 1, 1937, Beene assigned the judgment in question to J. B. Wilson.

It is undisputed that Kitchens did not redeem the lands which had been sold under the execution within the year allowed by statute for redemption, (Ark. Stat., 1947, § 30-441).

After the redemption period of one year had expired, the sheriff executed four separate deeds dated August 12, 1937, to Alvin Rogers, which deeds corresponded, as to lands described and amounts paid, to the four certificates of purchase. Thereafter, August 28, 1937, Alvin Rogers and wife, by quitclaim deed, conveyed the lands so conveyed to him at the execution sale, to J. B. Wilson.

The present suit was filed January 13, 1938, by Kitchens against Wilson to cancel the deeds executed, in connection with the execution sale, by the sheriff to Rogers, and the deed from Rogers and wife to Wilson.

Appellee alleged that the execution sale was void primarily because (1) at the time of the sale, Wilson and Kitchens were partners, the judgment represented a

partnership debt, the lands sold on execution were partnership lands, and that one partner could not purchase the lands of the other at such sale; (2) that the sale was also void because made after three o'clock in the afternoon; (3) the lands were sold in lots including separate tracts; (4) lands were included in the sale which did not belong to Kitchens or Wilson; (5) that there were certain erroneous descriptions; (6) the sheriff failed to make proper return of the execution; (7) the sheriff failed to file copies of the certificates of the purchase in the office of the clerk, and (8) that a trust relationship existed between the parties and for fraud on the part of Wilson. Appellee also asked for an accounting.

Defendant, Wilson, interposed a general denial, and specifically denied that a partnership relationship or a trust or fiduciary relationship existed; denied that he, Wilson, was guilty of any fraud, alleged that the execution sale was valid, and asked that appellee's complaint be dismissed for want of equity and that his, Wilson's, title to all lands embraced in the sheriff's deeds, and the deed from Alvin Rogers to him, Wilson, be quieted against any claims of appellee.

The trial court found, in effect, that a partnership relation existed between Kitchens and Wilson which had never been dissolved, that the execution sale was ineffective and should be cancelled in so far as the rights of Kitchens were concerned, because of such relationship. No specific finding was made by the court whether the sale was ineffective or void for any of the other reasons, supra, alleged and assigned by appellee.

The court further found that Kitchens and Wilson had from time to time engaged in other partnership enterprises, that all lands and other partnership assets should be converted into partnership property and that a Master should be appointed to make an accounting, and entered a decree accordingly.

This appeal followed.

Appellant, Mrs. Mary Bird, a daughter of J. B. Wilson, was made a party defendant by appellee. Refer-

ence will presently be made as to her connection with the case.

We first determine whether there existed a partnership or trust relation between Kitchens and Wilson in the lands sold at the execution sale and whether Wilson practiced a fraud on Kitchens, in the circumstances.

We have concluded, after considering the entire record, that the preponderance of the testimony shows that no partnership or trust relationship was established or existed, that no fraud was shown on the part of Wilson, and that the findings of the court to the contrary were against the preponderance of the testimony. The facts reveal that Kitchens and Wilson, for a great many years prior to about 1931, had been engaged in a number of separate joint enterprises or adventures for profit, such as purchasing lands, buying cotton and borrowing money. Each also, during this time, carried on separate undertakings and enterprises of his own without including or consulting the other.

Kitchens was a prominent attorney and also Member of Congress for a number of years. His own testimony on this relationship is most significant. He testified that he practiced law as a profession, that he had lands and other property in which Wilson had no interest, that he made deals of his own for profit and sums up their relationship in his answer to the following question: "Q. As a matter of fact each trade that was made was either put up to him by you, or by him to you, and you could come in on it or stay out, couldn't you? A. Well, I suppose so."

We hold, therefore, that they were not partners, but were dealing at arms length with a joint obligation at the time of this execution, in the circumstances, and no fiduciary relationship existed between them.

While, as indicated, since three years had elapsed after the entry of the judgment in question, the judgment lien had expired, (Ark. Stat. 1947, § 29-131). However, while the judgment lien expires at the end of this three year period, unless revived, the judgment it-

self remains in full force and effect for ten years, and the execution may be issued at any time within this ten year period, (Ark. Stat. 1947, §§ 30-103, 37-212 and 29-130).

Under the statutes, supra, appellee had the right, at any time within the one year redemption period, to make a direct attack upon the execution sale in the Circuit Court where the judgment was rendered and on which the execution was issued, for any of the irregularities alleged, supra, the sale during this redemption period being voidable and not void. He was also given the absolute right to redeem it within this period. As indicated, appellee took no action at all during the redemption period.

The Circuit Court had ample power to determine whether the sale should have been vacated, but appellee having waited until after his right to redeem had expired and the sheriff had executed the deeds to the purchaser, his right to question the sale for irregularities, such as alleged, was terminated or cut off and his present suit to void the sale is a collateral attack. After the redemption period, his right of attack was limited to defects, in the sale, which made the sale void, or for actual fraud perpetrated by appellant, Wilson.

As we have pointed out, the sale was not void, but during the redemption period was voidable only and subject to direct attack by Kitchens during this period.

The applicable and general rule is stated in 21 Am. Jur. 257, VII. Relief from Execution, as follows: "Section 517. Generally.—The fact that there is a valid judgment does not, of course, preclude an attack upon an execution sale held thereunder and a deed executed and delivered in pursuance thereof. Generally, relief should be sought, if at all, in the court from which the execution issued. * * *

"Section 519. Collateral Attack.—The general rule is that if there is any ground for relief against an execution, such relief must be sought in the original cause, and not by a new and independent proceeding. This rule is upheld of course, not merely in regard to original

writs of execution, but also in regard to alias and pluries writs of execution. The rule prevails where the collateral attack is sought to be made because of a clerical error or because of an irregularity committed by the execution officer, such as a sale made in violation of a stay of execution, or after a defective appraisement, or without any appraisement, or, in general, because of defects or irregularities in connection with the execution which do not render it void, particularly where no one sustains an injury thereby and where the sale has been confirmed. There are, however, some cases in which a confirmation of the sale is held not to preclude a collateral attack thereon. The collateral attack may be made where the execution is void, and the same remedy in certain cases of fraud. These general rules are applicable to execution deeds which may not be impeached collaterally for mere irregularity, although the defendant in execution may deny the validity of such a deed if made to one who was not the purchaser, but a stranger to the proceedings."

Appellant, Mrs. Mary Bird: Nearly a year after the filing of the present suit, appellee, as indicated, by amendment to his complaint, made Mrs. Bird a party. He alleged that a deed of trust given by Wade Kitchens and J. B. Wilson to Clyde Fincher, trustee for T. P. Lester, had been foreclosed and judgment rendered October 26, 1936, against Kitchens and Wilson for $6,844.44 plus interest; that this judgment was assigned by Lester to Mrs. Bird December 30, 1936, for $7,000; that the lands described in the deed of trust were sold and purchased by Mrs. Bird September 11, 1937; that Kitchens redeemed the lands by paying to the Clerk September 10, 1938, $8,303.13, and this money was paid by the Clerk to Mrs. Bird. It thus appears that Kitchens has paid $8,303.13 to satisfy a judgment for which he was liable for only one-half. Appellant so concedes and says: "One-half of the judgment was the debt of Mr. Wilson and he should be accountable for one-half of the amount paid by Kitchens to satisfy the Lester judgment."

It appears, however, that the trial court made no finding as to the amount due from Wilson to Kitchens

on this particular transaction, it appearing that an accounting would be necessary in order to determine the interest of each party after allowing certain credits. The proof was not fully developed, and this joint transaction, along with others, not determined, was reserved for further proceedings, involving an accounting.

Accordingly, the decree is reversed and the cause remanded with directions to quiet appellants' title to all the lands sold at the execution sale and described in the sheriff's deeds in which Wilson and appellee, Kitchens, had any interest, to give appellants possession and for further proceedings consistent with this opinion.

Griffin Smith, C. J., dissents in part.

Justice McFaddin concurs.

Ed. F. McFaddin, Justice (concurring). Assuming the decree here involved is final and appealable (which is a point not discussed by either side, but one concerning which I am in doubt), then I reach the conclusion that, as regards all of the lands except those in the Lester foreslosure, Kitchens is barred by limitations and laches from maintaining this present suit. I arrive at this conclusion by a process of reasoning different from what is reflected in the majority opinion, hence this concurrence:

1. At most, the relationship between Kitchens and Wilson in their various dealings, until June 2, 1946, was that of joint adventurers. They did not engage in a general line of business; each separate transaction was dependent on mutual agreement. Kitchens was interrogated, and answered:

"Q. As a matter of fact, each trade that was made was either put up to him by you or by him to you, and you could come in or stay out, couldn't you?

"A. Well, I suppose so."

For definition and discussion on joint adventurers, see 30 Am. Juris. 677, 33 C. J. 841, 48 C. J. S. 801 and Annotation in 138 A. L. R. 968.

2. On June 2, 1936, the joint adventure relationship definitely ceased between Kitchens and Wilson. Kitchens testified that on that date and by invitation he attended a meeting in Wilson's office to seek a solution of their difficulties, but that when a certain attorney appeared as representing Wilson, then Kitchens (to quote him)

". . . got up and said, 'Ill have nothing to do with it,' and I walked out and have never been back.

. . . . .

Q. So after this meeting there . . . , did you realize it was up to you to protect your own interest the best way you could without help from Mr. Wilson?

A. Sure, I thought I was doing that.

Q. You were not getting any help from him, you knew that?

A. Yes, I knew it.

Q. And you didn't expect any from him after that time?

A. No, sir."

Other evidence shows that nothing but hostility existed between Kitchens and Wilson after June 2, 1946. Under all the evidence, that day marked the end of their joint adventure, and left each free to deal with the other at arms' length.

3. With Wilson and Kitchens dealing at arms' length, Kitchens should have exercised his rights before they were lost by limitations and laches. Instead, he waited past the year to attempt to redeem from the execution sale, and waited until oil had been discovered near some of the lands, before taking steps to claim any alleged rights. Thus, limitations and laches bar him from maintaining the present suit.

Griffin Smith, Chief Justice, dissenting in part. I am not certain that "partnership" was the proper word for the Chancellor to use in connection with the relationship between Kitchens and Wilson. Perhaps not.

However, to me a preponderance of the evidence is persuasive that in respect of numerous transactions Kitchens and Wilson were jointly interested, and were not—as the majority opinion finds—at all times dealing at arm's length. In some cases there was apparent mutuality when purchases were made, hence each occupied toward the other a position of trust. The Chancellor found that a master should examine all of these transactions, take proof regarding their origin, the duration of ownership, and final disposition of the holdings, and state an account. I do not think the record before us is sufficient for determination of the equities, hence in this action I would merely sustain what in effect the Chancellor found generally—that a trust relationship existed, requiring all of the facts to be developed. It would then be appropriate to review the facts and say whether liability exists.

BLACK *v.* STATE.

4562

Opinion delivered June 20, 1949.

Rehearing denied October 3, 1949.

Robert J. Brown, Joe W. McCoy, W. H. Glover and *Carl Langston,* for appellant.

Ike Murry, Attorney General, and *Jeff Duty,* Assistant Attorney General, for appellee.

FRANK G. SMITH, J. Appellant was put to trial upon an information charging him with the crime of murder in the first degree, alleged to have been committed in the perpetration of the crime of rape upon the person of Betty Jane McCall. He was found guilty of the offense charged and was given a death sentence, from which judgment is this appeal.

Appellant moved to quash the jury panel upon the ground that no female was on the jury. It was shown that although the number of women who were qualified electors eligible for jury service in Pulaski County, where the case was tried, was nearly as large as the number of

male persons eligible for jury service, no woman had been selected for jury service in the criminal division of the circuit court for a long number of years and none had served as jurors in that division of the circuit court. An exception was saved to the action of the court in overruling the motion to quash the panel.

The identical question here raised was presented in the case of *Bailey v. State,* ante, p. 53, 219 S. W. 2d 424, which like the instant case came up from the Pulaski Circuit Court, and what was said there is controlling here. After a review of the authorities, which we do not repeat, it was there said:

"We think the inference deducible from the Fay case (332 U. S. 261, 61 S. Ct. 1613, 91 L. Ed. 2043), is that where a State does not impose upon women as a class the inescapable duty of jury service, a defendant who complains that due process was denied, or that he was not afforded the equal protection contemplated by the Fourteenth Amendment, must show something more than continuing failure of jury commissioners to call women for services in a division of the Court where the innate refinement peculiar to women would be assailed with verbal expressions, gestures, conversations and demonstrations from which most would recoil."

Miss McCall, an unmarried woman, was killed on the night of the 23rd of September, 1948, at some hour between 1:30 a. m., and 4:00 a. m. The undisputed testimony shows that Miss McCall, who was employed as acting director of nursing education at the Veterans Hospital at Ft. Roots, near Little Rock, drove her car to a filling station where appellant was employed in the city of Little Rock, for battery service, and while the service was being rendered an engagement was made for appellant to escort Miss McCall to a night club where they might engage in dancing. They had never met before. Miss McCall gave appellant her address and telephone number, and on the following Wednesday he called her on the phone and she agreed to come for him at his place of business in her car. She did so, and upon her arrival appellant took the wheel and thereafter did all the driving.

They started to a suburban night club. On the way appellant bought a bottle of whiskey. When arrested he told the officer who arrested him that he had bought a pint of whiskey. At the trial he testified that he bought a bottle containing 1/5th of a gallon.

They were accompanied to the night club by appellant's roommate, a young man named Jimmy Wells, and his companion, a young lady named Miss Mills. Appellant introduced this couple to Miss McCall as they had never met before. The four drove to the night club where appellant secured ice and prepared drinks, but only he and Miss McCall drank. The other couple did not drink. There is some question as to whether Miss McCall drank, but we think the fair implication is that she did.

After drinking and dancing for a time, Miss McCall broke the strap on one of her shoes, and the party returned to town, leaving Wells and Miss Mills at a service station where Wells was employed. Appellant and Miss McCall drove to Miss McCall's apartment. Her roommate testified that Miss McCall arrived there about 11:15 and after changing her shoes she and appellant returned to the night club. The last person testifying in the case who saw deceased alive was the band leader at the night club, who knew appellant and spoke to him and the band leader testified that appellant and deceased left the night club about 1:30 a. m. No other person testifying in the case, except appellant, thereafter saw her alive.

The next person who saw deceased at all was appellant's roommate, Jimmy Wells, who testified that he was awakened by appellant about 4:00 a. m., who told him that Miss McCall was in the car and he thought she was dead. Appellant asked Wells if he should drive to a hospital, but when Wells saw that Miss McCall was dead, he told appellant to drive to the police station, which appellant did.

Upon reaching the police station the police saw the dead body of Miss McCall lying with her head in the window of the car. The police arrested appellant and called

the Prosecuting Attorney, and the deputy prosecuting attorney came, with a young lady stenographer who reported stenographically all that was said after her arrival. The deputy prosecuting attorney asked appellant if he wished to make a statement, and advised him that anything he said might be used against him. He was not asked if he wanted to see an attorney before making his statement.

The undisputed testimony is that appellant's statements were made freely and voluntarily and without duress, threats or promises of any kind. The statement was not in the nature of a confession, but was a narrative of what had occurred between appellant and deceased. He admitted that he had sexual intercourse with deceased, but said it was with her assistance, and he denied any intention of killing deceased. Asked if deceased resisted him, he stated that she did for a time, but that he "got it."

The stenographer had transcribed her notes, and the deputy prosecuting attorney had the transcription thereof in his hand while cross-examining appellant. Objection was made and overruled to the use of these notes. Had a confession been shown, it would have been improper to introduce any part thereof without introducing the whole statement; however, the deputy prosecuting attorney in his examination of appellant offered to submit the transcription to appellant's attorney, which offer was declined. The principal use of the transcription was to ask appellant if he had made certain statements disclosed by the transcription, some of which he admitted, while others were denied. The testimony on the part of the state was to the effect that appellant had made at the police station certain statements which he denied having made while testifying as a witness at the trial. We think this cross-examination was entirely proper and permissible.

Objection was made to the introduction in evidence of a pair of trousers which appellant admitted were his, on which blood was found. Appellant admitted that when he went to his room to advise with his roommate he had

changed his trousers, and that the trousers which he had changed and which were found on his bed were his.

When appellant first drove up to the police station a picture of deceased in the car was taken. The body was then carried to the undertaker where other pictures were made. Objection to the introduction of pictures was made upon the ground that they were taken by one person and developed by another, but it was shown that the pictures developed were those taken and correctly revealed the body of the deceased when they were taken. Objection was also made that the pictures were so gruesome as to arouse and inflame the jury and that their introduction added nothing to the testimony of witnesses who described the location and condition of the body.

We think, however, no error was committed in permitting the introduction of the pictures. They told a story which the testimony of witnesses could not well have described. There was a hiatus in the testimony as to just what happened between 1:30 a. m., and 4:00 a. m., and these pictures told a story conflicting with such explanations as appellant vouchsafed. They reveal deceased's ordeal during that time, and discredited appellant's statement that he had sexual intercourse with the assistance of deceased. Witnesses who heard appellant's statement at the police station testified that appellant said he and deceased had two fights, one when they first stopped the car and while having intercourse they had another fight. They had two fights, one before they had intercourse, and the other while they were having it. Witnesses for the State testified that appellant did not appear to be intoxicated while making these statements.

The officer in charge of the State Police Laboratory testified that he had made tests of clothing which evidence showed had been worn either by appellant or by deceased, and that he found blood on the man's trousers and on his shirt, and that he also found blood spots on the lady's suit shirt and on her pants or step-ins which had not been removed from her body.

Appellant testified that he had been making love to the deceased all during the evening and while riding in

the car where the intercourse was had, and that while at first she repulsed him that later she assisted him. He testified that he became angry when deceased bit his hand, and he exhibited scars showing that she did bite him, but the jury was not unwarranted in finding that the woman was offering such resistance as she could. The pictures show that deceased was bruised all over her face and body, and that she had bled profusely from her wounds. The State's testimony was that appellant was asked, "When did you quit hitting her?" And he answered, "She kept begging me to stop and I finally did and she sat back upon the seat and leaned her head on the door" and she was in that position when appellant drove to the police station.

A police officer testified that he arrived at the station about 4:25 on the morning of September 23rd, at which time deceased's body had been removed from the car. Witness examined the car and found one of deceased's shoes on the right hand side of the car. Another shoe was directly up in front of the floor board, and he found buttons on the floor board of the car, and a lady's wrist watch on the right hand side of the car on the floor board in the back of the car.

The head of the department of Pathology at the University of Arkansas Medical School, performed an autopsy, at the request of the coroner, at 10:00 a. m. on September 23rd. He testified that the body revealed numerous bruises below the skin, and most apparent were those on the right and left forearm and left leg and over the pubic bone, and over the head and face and neck. That there was a large hemorrhage over the left eye, and a large cut over the left eye, about an inch or an inch and a half in length, and the examination revealed a small wound in the forehead. There were bruises over the whole body, but particularly on the arms and legs, and that an examination of the brain disclosed a small area of hemorrhage, indicating a blow to the head, and that they found that the thyroid cartilage was shattered and the vocal cords were swollen shut. He further testified that deceased's hands showed a great many

marks of injury, finger nails, or marks of struggle on the left and right hands.

The coroner himself, a practicing physician, who participated in autopsy, testified that the removal of the windpipe disclosed that it had been crushed and the edema or swelling had caused an obstruction where no air could get in, that the deceased had died of suffocation due to an injury to the windpipe.

That the deceased was guilty of a great indiscretion in making and keeping her appointment with appellant admits of no denial, and the jury's verdict reflects that she paid with her life for the indiscretion. That appellant had carnal knowledge of the deceased is a fact which he admitted, and the recited testimony supports the finding of the jury that this was not a matter of mutual sexual gratification or the result of consent, or of her assistance as appellant stated. If appellant killed deceased in the attempt to rape her, although he had no intention of killing her, he committed the crime of murder in the first degree. Section 2969, Pope's Digest, so provides. The testimony recited fully warranted the jury in arriving at the conclusion.

Evidence was offered as to appellant's good moral character, and other testimony was offered by the State to the effect that his reputation for morality was not good. There was testimony also that appellant had been fined for the commission of certain misdemeanors, one for drunken driving. This testimony was admitted and limited to the consideration of appellant's veracity as a witness, and was admissible for that purpose. *Lowmack v. State,* 178 Ark. 928, 12 S. W. 2d 909; *Shinn v. State,* 150 Ark. 215, 234 S. W. 636; *Smith v. State,* 74 Ark. 397, 85 S. W. 1123; *Younger v. State,* 100 Ark. 321, 140 S. W. 139.

The motion for a new trial was accompanied by a petition signed by 8 of the 12 members of the trial jury, asking the court to reduce the death sentence to a life sentence, or to grant a new trial. Conceding that the court had this power, its exercise was a matter within the

discretion of the court and under the facts disclosed by the record in this case we are unable to say that there was any abuse of this discretion.

Finding no error, the judgment is affirmed.

Justice GEORGE ROSE SMITH not participating.

MCELVAIN *v.* BORDER.

4-8923 221 S. W. 2d 793

Opinion delivered June 27, 1949.

E. L. Hollaway, for appellant.

Fietz & McAdams, for appellee.

FRANK G. SMITH, J. Appellants filed in the Circuit Court for the Eastern District of Clay County a petition for certiorari to quash an alleged order of the Board of Education of that County, dissolving School District No. 76 and attaching its territory to School District No. 11. In the judgment from which is this appeal it was found that "the order of the Clay County Board of Education dissolving School District No. 76 and attaching said dis-

trict to School District No. 11 in Clay County was made according to law". The petition was dismissed and from that order is this appeal.

The question of fact in this case is whether the order calling for an election abolishing District No. 76 and annexing its territory to District No. 11 was made by the County Board or by the County Supervisor of Schools.

It may be said that the order complained of is valid on its face as the court found, and contains the recitals of all the facts essential to confer jurisdiction on the County Board to make the order in question. If this finding was untrue or unsupported by the testimony the remedy of protestant was to appeal from that order. That the right of appeal exists in such cases is established by the opinions of this court in the following cases: Austin School Dist. v. Young, 212 Ark. 75, 204 S. W. 2d 902; Acklin v. Jackson County Board of Ed., 212 Ark. 422, 206 S. W. 2d 745; Hale v. Hope School Dist. No. 1-A, 212 Ark. 915, 208 S. W. 2d 431.

It is not contended that the order complained of is void on its face, or that the right of appeal was lost without fault. Having an adequate remedy by appeal certiorari did not lie.

The ruling of the State Board of Education is that orders abolishing school districts and attaching their territory to other districts can be made only by the County Board of Education, and not by the County Supervisor of Education, and we think this ruling is correct.

It does appear that the notice of the special election on dissolving District No. 76 and attaching its territory to District No. 11 was given by the County Supervisor of Education. But this power was conferred and this duty imposed on that officer by Act 202 of the Acts of 1947, § 1 of which reads in part as follows: "The County Supervisor shall give notice of each annual school election and all special school elections called for any purpose * * *".

Under the authority of this Act the notice was properly given by the Supervisor. No error appears and the judgment must be affirmed and it is so ordered.

HALLER *v.* RATCLIFFE.

4-8964 221 S. W. 2d 886

Opinion delivered June 27, 1949.

Warren E. Wood and *Griffin Smith, Jr.*, for petitioner.

Ike Murry, Attorney General and *John Williams* and *Francis W. Wilson,* Assistant Attorneys General, for respondent.

GEORGE ROSE SMITH, J. Petitioner is the mother of a four-month-old boy whose custody is involved in this proceeding. On March 18, when the baby was less than a month old, petitioner signed and verified a pleading by which she entered her appearance in the probate court and agreed to the appointment of a guardian for the child, the guardian to have power to consent to the child's adoption. Ark. Stats. (1947), §§ 56-120 and 45-210—45-217. On May 3 the respondent, a supervisor of the Child Welfare Division, filed an *ex parte* petition in the Pulaski Probate Court and was appointed guardian.

Later in the same day petitioner applied to the chancery court for a writ of habeas corpus, alleging that re-

spondent was illegally detaining the child. In her answer Mrs. Ratcliffe relied upon her letters of guardianship to justify her custody. At a hearing in the chancery court the probate petition and order were introduced in evidence. It was stipulated that petitioner's verified entry of appearance had been exhibited to the probate court but had not been made part of the record. Petitioner offered to prove that she had revoked this instrument before the guardian was appointed, while the respondent offered to show that there had been no revocation. The chancellor took the view that the controversy should be presented to the probate court and accordingly dismissed the case. Petitioner brings it to us by certiorari, the established method by which we review habeas corpus proceedings. *Johnston* v. *Lowery,* 181 Ark. 284, 25 S. W. 2d 436.

Petitioner's basic premise is that the *ex parte* proceeding in the probate court was void because she was not made a party. She argues that the chancellor should have disregarded the probate court order and cites our cases holding that upon collateral attack the recitals of a judgment cannot be impeached by extrinsic evidence. In those cases, however, the judgments under attack were prima facie valid, the extrinsic evidence being offered to prove invalidity. Here the judgment is apparently void for want of personal jurisdiction, and petitioner's entry of appearance is relied upon to supply this defect. If the rule advanced by petitioner applies to this situation, the rather novel consequence is that the probate court order is void upon collateral attack and yet may withstand a direct attack—the converse of the usual condition. We find it unnecessary, however, to decide this issue, for the decision may rest on a broader ground.

The writ of habeas corpus, while a matter of right in the sense that its availability is guaranteed by the Bill of Rights, nevertheless does not issue as a matter of course. It is an extraordinary remedy, to be invoked when no other effective means of relief is at hand. This petitioner has a complete remedy in the probate court. Under our statutes she may file her complaint in that

court to set aside the order of guardianship. Ark. Stats. (1947), § 29-506. It is suggested that this procedure would not give petitioner immediate custody of her son, but the answer is that the probate court is one of superior jurisdiction and has power under the Civil Code to grant provisional remedies preventing great or irreparable injury to the complainant. *Ibid.*, §§ 27-103, 27-108, and 32-103. The chancellor was therefore right in declining to entertain a controversy that can better be determined by the court in which it arose.

The petition is dismissed, without prejudice to further probate proceedings.

Griffin Smith, C. J., not participating.

CHAPMAN CHEMICAL COMPANY *v.* TAYLOR, ET AL.

4-8844

Opinion delivered June 27, 1949.

Rehearing denied October 3, 1949.

Evans, Exby & Moriarty and *Coleman, Gantt & Ramsay,* for appellant.

A. F. Triplett, Bridges, Bridges, Young & Gregory and *John Harris Jones,* for appellee.

FRANK G. SMITH, J. Mrs. Virginia C. Wilson owns a farm in Jefferson County, which she rented in the year 1947 to G. E. Taylor for an agreed share of the crops grown on the land, the principal crop being cotton. She and her tenant filed this suit against Elms Planting Co., a corporation, to recover damages to their crop occasioned by the use of a chemical dust by the Elms Co. called 2-4-D, in spraying a rice crop on land owned by the Elms Co. which was three-fourths of a mile from plaintiffs' crop.

The testimony shows that within very recent years there has been developed a powerful chemical referred to as 2-4-D, which is very damaging to any broad leaved plant with which it has contact, but which does no harm to grasses and plants which are not broad leaved. The Elms Co. used this chemical in spraying its rice crop and particles thereof drifted and settled on plaintiffs' cotton crop, greatly reducing the yield thereof and this suit was brought to recover compensation for this damage.

The Elms Co. filed an answer in which liability was denied. In addition it filed a cross-complaint against Chapman Chemical Co. and others who have passed out of the case. Service on the Chemical Co., an Illinois corporation, was had under the provisions of Act 347 of the Acts of 1947, which were fully complied with. It was alleged in its answer that if the Elms Co. was in fact liable in any amount, the Chemical Co., if not primarily and solely liable, was at least a joint tortfeasor and the provisions of Act 315 of the Acts of the General Assembly of 1941, known as the Uniform Contribution Among Tortfeasors Act were invoked.

The Chemical Co. was not made a party defendant to the original suit of the plaintiffs who filed a motion praying that the suit against the Chemical Co. be dismissed. This motion was overruled.

Numerous other pleadings were filed. The Chemical Co. appeared for the purpose only of moving to quash the service against it. The testimony on the hearing of this motion will be later discussed. The motion was overruled and exceptions saved. The Chemical Co. moved to dismiss also upon the ground that Act 315, supra, has no application inasmuch as there is no liability on the part of the Chemical Co. to the plaintiffs. This motion, which will later be discussed was also overruled. The case proceeded to a trial where numerous exceptions were saved to various actions and rulings of the court and resulted in a verdict in favor of the plaintiffs against the Chemical Co. and in favor of the Elms Co. From the judgments rendered upon this verdict the Chemical Co. has appealed and so also have the plaintiffs.

The first question properly to be considered is that of the sufficiency of the service on the Chemical Co. which, as we have said, was had under the provisions of Act 347 of the Acts of 1947, the relevant provisions of which are as follows:

"Section 2. Any non-resident person, firm, partnership, general or limited, or any corporation not qualified under the Constitution and Laws of this State as to doing business herein, who shall do any business or perform any character of work or service in this State shall, by the doing of such business or the performing of such work, or service, be deemed to have appointed the Secretary of State, or his successor or successors in office, to be the true and lawful attorney or agent of such non-resident, upon whom process may be served in any action accrued or accruing from the doing of such business, or the performing of such work, or service, or as an incident thereto by any such non-resident, or his, its or their agent, servant or employee. Service of such process shall be made by serving a copy of the process on the said Secretary of State, and such service shall be sufficient service upon the said non-resident of the State of Arkansas, provided that notice of such service and a copy of the process are forthwith sent by registered mail by the plaintiff, or his attorney, to the defendant at his last known address, and the defendant's written return receipt, or the affidavit of the plaintiff, or his attorney, of compliance herewith are appended to the writ of process and entered in the office of the Clerk of the court wherein said cause is brought. The court in which the action is pending may order such continuance as may be necessary to afford the defendant, or defendants, reasonable opportunity to defend the action."

This act was upheld as valid legislation in the case of Gillioz v. Kincannon, Judge, 213 Ark. 1010, 214 S. W. 2d, 212, except the retroactive feature thereof. Here all relevant facts accrued after the act was in full force and effect. The insistence is, however, that the Chemical Co. has done no business in this State sufficient to bring it

within the provisions of the act. Upon this issue of fact the following testimony was offered.

There are three separate corporations, each doing business as the Chapman Chemical Co. One of these is located in the State of Louisiana, another in the State of Illinois, and the third in the State of Tennessee. The Tennessee corporation is engaged in manufacturing chemicals solely for sale by the Illinois Co. and the Louisiana Co. All the stock in all three corporations is owned by Dale Chapman except a single share in each, which is otherwise owned for qualifying purposes. Orders are sent to and filled by the Illinois corporation, the only one of the three companies here sued. The Illinois corporation has no office or warehouse in this state, has no bank account here, and has no agent in this State. Orders for the products of the Tennessee corporation are received in Illinois and filled from that state from the Tennessee office by shipments in interstate commerce at the direction of the Illinois company, which has the exclusive power to receive and fill orders. In this connection it may be said that no attempt was made to show that the Illinois corporation was doing business in the sense that it would be subject to penalties for failure to secure authorization from the state for admittance to the state.

It was shown, however, that for the 12 or 15 years last past, the Illinois company had sold throughout the State certain wood preservatives. Sales made in Arkansas comprised a substantial part of the company's business and its traveling salesmen had for many years operated in this State. Its principal customers were operators of lumber mills and wholesale lumber dealers, who act as distributors for the wood preservatives. Representatives of the Chemical Co. consulted and advised with the agricultural and forestry agents of this State as to the manner in which the products it was selling should be used, and as to additional uses thereof which might be made, and in otherwise building up a good will valuable to its business.

Specifically as to the use of 2-4-D the testimony is to the effect that the Chemical Co. sought to introduce its use in the rice growing area of the State, and to that end its representatives came into the State and conferred with officers of the Rice Growers Assn. as to its use. It was agreed that a test should be made and one was made in this State, the purpose of which was to determine whether the 2-4-D dust could be distributed from an airplane, as could other chemical dusts of various kinds for various purposes by farmers. The test was made and it was shown that it could be so used. Chapman, the Company's president, testified that he knew it could be so used before the test was made, but the purpose of the test was to demonstrate that fact to prospective customers. No test was made as to the floating quality of the dust, that is the distance it would carry in the air after it was released from a plane.

Chapman brought with him in his automobile from Memphis to Stuttgart in this State a quantity of the powder or dust, for the purpose of making the test, and he paid the aviator for his services in making it. Chapman had cooperated with state experimental stations in this State in working out projects for the development of uses for the products sold by the Chemical Co. That Company provided literature containing instructions for the use of 2-4-D to local distributors in this State, to be given to prospective users of the Chemical Co. products. It joined Arkansas local distributors in advertising Chemical Co. products in this State, and arranged for the advertisement thereof in a local paper, one half of the costs of which it paid and finally it brought a suit, now pending against the Elms Co. for the purchase price of the dust the distribution of which by plane gave rise to this law suit.

The case of Frene v. Louisville Cement Co., 77 U. S. App. D. C. 129, 134 F. 2d 511, 146 A. L. R. 926, deals at length and reviews many authorities on the concept of doing business by a foreign corporation. The opinion was written by Justice Rutledge then an Associate Justice of the U. S. Court of Appeals for the

District of Columbia, now a member of the Supreme Court of the United States. It was there said that the mere solicitation of business whether on a casual or occasional or regular, continuous and long continued basis does not constitute doing business in a foreign state, and it may be added that filling orders thus obtained by shipping goods in interstate commerce would not constitute doing business. But it was said in addition, "Consequently it is (not) clear that if, in addition to a regular course of solicitation, other business activities are carried on, such as maintaining a warehouse, making deliveries, etc., the corporation is 'present' for jurisdictional purposes. And very little more than 'mere solicitation' is required to bring about this result."

The facts herein recited constitute something more than the creation of good will or solicitation of business, and while it was shown that none of the Chapman products were stored for delivery in this State, it was shown that a portion thereof was actually brought into and delivered in this State by the company's authorized representatives, in fact, its President, himself, and this was done for the purpose of making the test which was made in this State which induced the sale of the very product, the use of which, for the purpose intended, resulted in the damage for the compensation of which this suit was brought.

This federal case, supra, is extensively annotated in 146 A. L. R. 926, where the leading cases are cited, a review of which would protract this opinion to an interminable length.

A more recent case on the subject of service on a foreign corporation is that of State v. Ford Motor Co., 38 S. E. 2d, 242, in which many authorities are reviewed and the conclusions announced conform to the views here expressed.

We conclude that the trial court did not err in holding that Act 347 of the Acts of 1947 applied in this case and in refusing to quash the service had under that Act.

The Chemical Co. insists however, that even though it was properly brought before the court by the service

had upon it, it was nevertheless error to join it in the suit against the Elms Co. inasmuch as it was not named as defendant by the plaintiff in that case, and no relief was prayed against it. It is insisted that our joint tortfeasor act does not authorize this action. As has been said this is Act 315 of 1941 and the controlling portions thereof read as follows:

"Before answering, a defendant seeking contribution in a tort action may move ex parte or, after answering, on notice to the plaintiff, for leave as a third-party plaintiff to serve a summons and complaint upon a person not a party to the action who is or may be liable as a joint tortfeasor to him or to the plaintiff for all or part of the plaintiff's claim against him."

The case of Baltimore Transit Co. v. State, 183 Md. 674, 39 Atl. 2d 858, annotated in 156 A. L. R. 460, cites numerous cases which have construed this or similar legislation. A headnote of that case reads as follows:

"A statute authorizing a defendant in a tort action to implead as a third-party defendant one alleged to be liable as a joint tortfeasor applies only where there is a common liability to an injured person in tort, and is inapplicable where the injured person has no right of action against the third party."

Here the injured parties, the original plaintiffs, do not concede that they have no cause of action against the third party defendant, the Chemical Co. On the contrary, it is asserted that the plaintiffs did have and now have a cause of action against the third party defendant. Plaintiff's contention is that they had a cause of action against the Elms Co. on which they were content to rely, and they did not elect to complicate that case by making the Chemical Co. a party. But it is said in cross appellant's brief, that now that the Chemical Co. has been made a party, although not on their motion, the judgment aganist the Chemical Co. should be affirmed. Indeed the position of the cross appellants, the original plaintiffs, is that not only should the judgment against the Chemical Co. be affirmed, but that the judgment against the Elms Co. should be reversed for the

reason that under the undisputed testimony its liability as well as that of the Chemical Co. was established. The Chemical Co. contends that it is not liable in any event and that the judgment against it should be reversed and the cause dismissed, or if not the judgment should be reversed because of certain erroneous instructions given over its objections and exceptions.

These contentions of the Elms Co. and of the Chemical Co. bring us to a consideration of the case on its merits, and we shall treat the two contentions together, as they are inseparably connected. The record upon the issues joined (consisting of exactly 1,000 pages) is so voluminous that we shall summarize it without detailing it.

It is undisputed that 2-4-D powder will answer the purpose for which it was designed, that is of killing plants with large leaves which appear in fields of rice. The most noxious of those weeds is the coffee bean plant which matures about the same time the rice does, and if allowed to mature its seed will mix with the rice when threshed and will destroy or greatly lessen the marketability of the rice, unless separated from the rice at great expense and trouble, usually by hand.

The chief objection to the use of the powder is that it is very dangerous to such plants as cotton, potatoes, vegetables, etc., when it comes in contact with them. This characteristic of the powder was well known, in fact the literature which the Chemical Co. published and circulated gave warning of that fact. The plaintiffs, or cross-appellants, insist therefore that both the Chemical Co. and the Elms Co. are liable to them for the damage to their cotton crop caused by the use of this powder. It is undisputed that the use of the powder caused the damage for which plaintiffs sued.

It was shown by testimony, which is undisputed, that the practice of dusting agricultural crops, as well as truck farms, etc., has prevailed for a number of years and is becoming a common practice. Some of these chemicals are dangerous to livestock and others to plants of certain kinds and they are used for various purposes.

Extensive and experienced planters who have used chemical dust for a number of years for different purposes, testified that when the areas to be treated are sufficiently large, aeroplanes are used in scattering the dust or chemical, and that if properly applied even by planes, the dust does not float or extend more than fifty or one hundred fifty feet beyond the area intended to be treated, and that no damage results beyond that distance to plants which would be damaged if touched by the dust.

The testimony developed the fact of which the Elms Co. was unaware and it was not shown that the Chemical Co. was aware, and that is that the 2-4-D dust possessed the quality of floating for great distances when cast in the air, even for miles. None of the experienced farmers who dusted their crops for various purposes had ever known any other dust, when properly applied, to float for a greater distance than from fifty to one hundred fifty feet. As has been said, cross appellants' cotton crop was three-fourths of a mile from the Elms Co. rice field at the nearest point.

The testimony shows that the Elms Co. used the dust on a morning when no wind was blowing and that it was distributed over the rice field by an aviator whose regular business it was to dust crops with the use of his plane, and who testified that but little of the dust was cast upon any land except the rice crop as he was careful to shut off the distribution of the dust when making the necessary turns of his plane.

The operator supervising the dusting process testified that he had been engaged in the crop dusting business for 22 years, operating from California to Florida and from Mexico to Canada and that when properly distributed the dust did not extend more than 40 to 50 feet beyond the area treated, but this testimony did not relate to 2-4-D.

The question of foreseeability of probable injury from the use of 2-4-D was submitted to the jury in instructions given at the request of cross appellants over the objections of both Elms Co. and the Chemical Co.

The jury might well have found, and evidently did find, that there was no previous experience in the use of agricultural chemicals which gave any indication of the danger of using 2-4-D to a crop three-fourths of a mile away, or that its use was "A cause from which a person of ordinary experience and sagacity could foresee the result that might probably ensue". Alaska Lumber Co. v. Spurlin, 183 Ark. 576, 37 S. W. 2d, 82.

The testimony shows that before buying or applying the 2-4-D chemical the manager of the Elms Co. consulted one L. C. Carter of Ark. Rice Growers Assn. regarding the use of 2-4-D. Carter had been and was a manager of the Rice Experimental Station near Stuttgart, 7 or 8 years, and was at that time manager of the Rice Growers Coop. Assn. and the Elms Co. manager was informed by Carter that he, Carter, thought its use would be all right. In other words, there is no evidence upon which to predicate liability against the Elms Co. except the fact alone that the Elms Co. did use a dangerous chemical, and we conclude that the verdict of the jury in favor of the Elms Co. was not unsupported by the testimony and should be affirmed.

As to the Chemical Co. a different test as to liability must be applied. The three chemical companies operated under a single officer, Chapman being the president of all three and the owner of practically all of the stock of all the corporations. The Illinois company did not manufacture the 2-4-D chemical dust, but its Memphis affiliate did. Appellant Chemical Co. was the distributor and sole agent for the Tennessee company in this State, and the testimony shows that it was selling an extremely hazardous product and was selling it as its own product. Indeed the testimony shows that the Tennessee Co. was in effect and in fact the agent of the Chemical Co. in manufacturing the dust, as all sales thereof here involved were made by the appellant Chemical Co. The testimony shows that the Chemical Co. was selling the dust as its own product. It controlled and distributed all advertising material which recommended its use and gave directions therefor. At § 400 of the Chapter on Torts, Restatement of the Law, it is said that one who

puts out as his own product a chattel manufactured by another is subject to the same liability as though he were its manufacturer.

It is said there was no privity of contract between the Chemical Co. and cross appellants. This showing was at one time, and for some time considered necessary to occasion liability, the line of decisions to that effect going back to the early English case of Winterbottom v Wright, 10 Mees & W. 109, 152 Eng. Reprint 402, decided in 1842. But the courts have been getting away from that doctrine and many have entirely repudiated it and discarded it. The opinion of Justice Cardozo, then a member of the Court of Appeals of New York, and later an Associate Justice of the United States Supreme Court in the case of MacPherson v. Buick Motor Co., 217 N. Y. 382, 111 N. E. 1050, L. R. A. 1916F, 696, Ann. Cas. 1916C, 446, is credited with the inception of the modern doctrine of manufacturer's liability based upon foreseeability rather than privity of contract.

The Supreme Court of Mass. in the case of Carter v. Yardley, 64 N. E. 2d, 693, annotated in 164 A. L. R. 559, expressly repudiates the privity contract rule and stated that the MacPherson case, supra, was now generally accepted and the summary of the Mass. case and others there cited in that "The question in each case was whether the danger was sufficient to require the manufacturer to guard against it." In other words, that foreseeability and not privity was the proper test. See, also, § 824, Chapter on Sales, 46 Am. Jur. p. 946.

Now this 2-4-D powder is hightly efficient for its intended purposes, that is to kill broad leaved plants, but its very efficiency for that purpose makes its use extremely hazardous to other plant life.

An article appeared in the Ark. State Plant Board News in July, 1948, which began, "Effective June 24th the U. S. Civil Aeronautics Administration prohibits the use of 2-4-D dust by airplanes. This action was taken at the request of the U. S. Dept. of Agriculture following many complaints that drifting dust had injured cotton and other broad leaved crops."

This was subsequent to the spraying of the Elms rice crop which damaged appellant's cotton crop and in the law of negligence it is generally true that foresight and not retrospect is the standard of negligence. But here we are dealing with an extra hazardous chemical known to be highly dangerous.

The essence of this case is contained in instruction number 10-A given over the objection of the Chemical Co., which reads as follows:

"It was the duty of the defendant Chapman Chemical Company before putting an inherently dangerous product on the market to make tests to determine whether or not it would damage crops of others; if you believe from a preponderance of the evidence in this case that the 2-4-D dust applied on July 1, 1947, by the Elms Planting Company was an inherently dangerous product liable to damage the property of others, and that such tests were not made, then you are told that the defendant Chapman Chemical Company is negligent."

If this instruction is correct, the judgment against the Chemical Co. should be affirmed; if it is not, it should be reversed. Now a test was made but its purpose was to ascertain whether or not 2-4-D could be distributed by airplane as other dusts could be. It was found that it could be, but no test was made as to the floating quality of the dust, and it is this characteristic or quality of 2-4-D which makes its use extra hazardous. In other words, was the Chemical Co. under the duty of testing and knowing that 2-4-D dust, unlike other chemical dusts, would float for great distances. The undisputed testimony is that this 2-4-D, unlike other dusts, does not immediately or soon settle, but on the contrary floats in the air for long periods of time and for great distances, as much as 10, 15 or 20 miles, and one witness placed the distance at 35 miles.

That peril attended the use of the dust is undisputed. Indeed the literature circulated by the Chemical Co. contained this caution, "Chapman 2-4-D weed killer should be applied in such a manner as to avoid contacting crop plants such as cotton, sweet potatoes, vegetables, orna-

mental trees, etc." With this knowledge the Chemical Co. sold the dust, knowing that it would in its ordinary use be distributed from an aeroplane and it did this without making any test to determine what the effect thereof would be. Its literature referred to the dust as a proved weed killer and recommended the application of it by means of an airplane.

The undisputed testimony is that the Elms Co. bought the dust from the Chemical Co. and applied it in the manner directed for the known purpose for which it was sold and that this use thereof resulted in serious damage to cross-appellants. We think this testimony presents the question whether absolute or strict liability should apply.

In the case of Luthringer v. Moore, 31 Cal 2d, 489, 190 P. 2d, 1, it was said by the Supreme Court of California that, "It appears to be settled that the question whether the case is a proper one for imposing absolute or strict liability is one of law for the court." Among other authorities cited to support this statement is the restatement of the Law of Torts, § 520, Com. H.

If one casts into the air a substance which he knows may do damage to others, and in some circumstances will certainly do so, principles of elementary justice, as well as the best public policy require that he know how far the substance will carry or be conveyed through the air and what damage it will do in the path of its journey, and if he releases such a substance either from ignorance of, or in indifference to the damage that may be done, the rule of strict liability should be applied.

Such was the holding of the California case above cited. There a defendant engaged in pest eradication fumigated the basement of an office building above which there was a pharmacy. A preparation of hydrocyanic acid was used in the basement, which penetrated the floor and on the morning after its use an employee of the pharmacy was asphyxiated by the fumes of the acid. In holding the fumigator liable the opinion quoted the following statement from §§ 519, 523 of the Restatement of Torts: "One who carries on an ultra hazardous ac-

tivity is liable to another whose person, land, or chattels the actor should recognize as likely to be harmed by the unpreventable miscarriage of the activity for harm resulting thereto from that which makes the activity ultra hazardous, although the utmost care is exercised to prevent the harm.—An activity is ultra hazardous if it (a) necessarily involves a risk of serious harm to the person, land, or chattels of others which cannot be eliminated by the exercise of the utmost care, and (b) is not a matter of common usage.''

This opinion quoted from a prior opinion of the Supreme Court of California in the case of Green v. Gen. Pet. Corp., 205 Cal. 328, 270 P. 952, 60 A. L. R. 475, which collects other similar cases.

The opinion in the case of Spencer v. Madsen, 142 F. 2d, 820, deals with the question of liability of a manufacturer to a third party who had no contract relations with him. It was there said: ''Liability here is not predicated on the fact that the thing, when properly constructed, is inherently dangerous. Rather, it rests upon the principle that where the thing, when put to the uses for which it is intended by the manufacturer, by reason of defects which were known or could have been known by the exercise of reasonable care by the manufacturer, is dangerous to life and limb, the manufacturer is liable to third persons.''

We do not think the Chemical Company excused itself from liability by the mere showing that it was unaware of the peculiar carrying quality of the dust it was selling. Ordinary care required that it should know in view of the dangerous nature of the product it was selling, and it was charged with the knowledge which tests would have revealed. The case is therefore one in which the rule of strict liability should be applied.

Numerous instructions were asked, to the giving of which, or refusal to give, exceptions were saved. We do not review these for the reason that the instructions given fully covered every aspect of the case and conformed to the views herein expressed.

Justices Holt and McFaddin are of the opinion that the judgment for the Elms Co. should be reversed. Other members of the court are of the opinion that the judgment in favor of that Company should be affirmed. Justice George Rose Smith is of the opinion that Instruction No. 10-A above copied, which we said was of the essence of the case was erroneous and that the judgment against the Chemical Co. should be reversed for that reason. The result of these views is that the judgment for the Elms Co. should be affirmed and that the judgment against the Chemical Co. should also be affirmed. It is therefore so ordered.

George Rose Smith, J., dissenting in part. I agree that the standard of ordinary care is applicable in the case of the Elms Company, but I am unable to concur in the rule of absolute liability on the part of the Chemical Company. Instruction 10-A in effect told the jury that the latter company was negligent if it failed to discover by tests any possible harm that might result from the use of 2-4-D. Similarly, the majority hold that the manufacturer who puts a dangerous commodity on the market is responsible for the consequences of its use, no matter how unexpected or unforeseeable they may be.

I think the manufacturer's duty should be that of making such tests as are reasonably necessary in the circumstances—it being understood, of course, that the duty to take precautions increases proportionately with the degree of danger inherent in the commodity. It is shown that 2-4-D is harmless to narrow-leaved plants, but suppose for argument's sake that there is in the world one narrow-leaved plant that the dust will injure. Upon the majority's reasoning the Chemical Company would be liable for failing to test the dust on that particular plant, even though it may have made experiments with ten thousand other species. So as to the drifting quality of the chemical. The proof shows that many agricultural dusts have been widely used during a quarter of a century, yet none has ever before been known to drift more than a few rods. I think the jury should have the opportunity to decide whether the Chemical Company

acted with ordinary prudence in assuming that 2-4-D would float in the same way as other dusts.

The Restatement of Torts, cited by the majority, follows the rule of reasonable care in situations analogous to this one (§§ 388, 397, 400, 519). I find no reason for bringing into our law the principle of absolute liability. Experience elsewhere has shown that this doctrine is hard to confine, once its existence has been recognized. We shall be asked to extend the scope of this case in the future, and I can hardly see the point at which its application may logically be said to end.

GIBBS *v.* BATES.

4-8866 222 S. W. 2d 805

Opinion delivered June 27, 1949.

Rehearing denied October 3, 1949.

[redacted]

Harrelson, Harrelson & Cannon, for appellant.

Norton & Norton, for appellee.

ED. F. MCFADDIN, Justice. This appeal presents a controversy that has been intermittently in litigation since 1896; and involves the same parties and the same land as were before us in Gibbs v. Bates, 150 Ark. 344, 234 S. W. 175.

U. W. Jett was the husband of the present appellee, Mrs. Nora L. Bates. Jet owned a farm of 67 acres; and in 1894 he and the appellee signed and delivered a deed of the farm to appellant, Mrs. Eva E. Gibbs. The grantee never obtained possession of the lands. U. W. Jett died shortly after the execution of the deed, leaving surviving his widow and one son who died in 1916.

Litigation began after the death of U. W. Jett: (a) in 1896 Eva E. Gibbs filed a suit against Nora Jett (now Nora L. Bates), seeking possession of the land. Answer was filed, and judgment was rendered in favor of the defendant. (b) In 1897 Eva E. Gibbs filed a complaint in the St. Francis Circuit Court, praying for possession of the land, but finally took a nonsuit in that case.* (c) In August, 1920, Eva E. Gibbs filed a suit in the St. Francis Chancery Court against Nora L. Bates, in which the relief sought was the quieting of title of plaintiff. The evidence showed that Eva E. Gibbs was not in possession of the land, and her suit was dismissed by the Chancery Court; and that decree was affirmed by this Court in 1921, in the case of Gibbs v. Bates, *supra.*

* In defending one of these suits, Mrs. Bates set up that the 1894 deed was void because of her minority.

Mrs. Nora L. Bates continued in possession of the land at all times herein mentioned; and on January 7, 1948, filed in the Chancery Court this present suit to quiet her title. Mrs. Bates alleged: (a) that she was in sole and exclusive possession of the land, and had held the same continuously in actual, open, visible, notorious and adverse possession, under a claim of ownership, for more than 40 years; and (b) that Mrs. Gibbs had actual knowledge of such possession and claim of ownership on the part of Mrs. Bates for more than 25 years. Mrs. Gibbs admitted Mrs. Bates' possession, but claimed that Mrs. Bates was merely a tenant for life, and therefore could not claim by adverse possession and have her title quieted. Mrs. Gibbs insisted that the deed she held from U. W. Jett and wife conveyed the fee title, subject only to the dower and homestead of Mrs. Bates; and that upon Mrs. Bates' death the lands and possession would pass to Mrs. Gibbs by virtue of said deed. The issue was thus joined as to whether Mrs. Bates had acquired the fee title by adverse possession. The Chancery Court found for Mrs. Bates, and entered a decree quieting her title; and this appeal challenges that decree.

We have a wealth of cases which recognize the rule that possession of a life tenant is not adverse to the remainderman.† Nothing herein is opposed to the said rule of those cases; but we hold that the said general principle has no application to the case now before us. The relationship between Mrs. Bates and Mrs. Gibbs was never that of a life tenant and a remainderman, because the deed to Mrs. Gibbs did not undertake to create a life estate and a remainder.

In Wallace v. Wallace, 179 Ark. 30, 13 S.W. 2d 810 Mr. Justice McHaney, speaking for this Court, discussed remainders and how they were created:

"'A remainder,' says Mr. Tiedeman, 'is therefore a future estate in lands, which is preceded and sup-

† Some of these cases are: Ogden v. Ogden, 60 Ark. 70, 28 S. W. 796, 46 Am. St. Rep. 151; Killeam v. Carter, 65 Ark. 68, 44 S. W. 1032; Collins v. Paepcke-Leicht Lbr. Co., 74 Ark. 81, 84 S. W. 1044; Stricklin v. Moore, 98 Ark. 30, 135 S. W. 360; Davis v. Neal, 100 Ark. 399, 140 S. W. 278, L. R. A. 1916A, 999; LeSieur v. Spikes, 117 Ark. 366, 175 S. W. 413; Smith v. Maberry, 148 Ark. 216, 229 S. W. 718; Sadler v. Campbell, 150 Ark. 594, 236 S. W. 588.

ported by a particular estate in possession which takes effect in possession immediately upon the determination of the prior estate, and which is created at the same time and by the same conveyance.' Tiedeman on Real Property (3rd Ed.), section 296.

"A remainder is a residue of an estate in land, depending upon a particular estate, and created together with the same. 2 Tho. Co. 126. After quoting the above definition, Professor Graves, in his notes on Real Property, section 173, commenting thereon, says: 'In order that there may be a remainder, there must be a particular estate upon which it may depend; . . . ' "[1]

The deed from Jett and wife to Mrs. Gibbs did not attempt to create a remainder in Mrs. Gibbs' based on a prior life estate to Mrs. Bates; and Mrs. Bates' claim that the deed was void certainly could not have made the relationship to be that of life tenant and remainderman, because such relationship did not arise at the time the deed was signed.

If we say that the 1894 deed signed by Jett and wife was void insofar as Mrs. Bates was concerned, then all that Jett conveyed to Mrs. Gibbs was his interest in the land subject to Mrs. Bates' dower and possibility of homestead; and we have repeatedly held that the widow, by notice, may commence the running of adverse possession in her favor against the heirs. In Brinkley v. Taylor, 111 Ark. 305, 163 S.W. 521 the widow had only a dower right, but by adverse holding she acquired the fee as against the heirs, even though they never had dower assigned to her. Even though her entry on the land is presumed to be permissive, and not in hostility to the heir until the fact of hostility is affirmatively proved, nevertheless, in that case such hostility was shown.

In Clark v. Wilson, 174 Ark. 669, 297 S.W. 1008, we reviewed a number of cases on this question as to when the holding by the widow may become adverse to the heirs; and we quoted from Watson v. Hardin, 97 Ark. 33, 132 S.W. 1002:

[1] See, also, 33 Am. Juris, 508, "Definitions and characteristics of a remainder."

"'. . . . it is true that her claim and possession might have been of such a nature as to amount to an entire disseizin of the heir and an entire denial of his rights, so as to result in an acquisition of title by adverse possession; but, before her possession could become adverse, it was necessary for her to first repudiate the title (of her husband) and to disavow any claim thereto as his widow; and it was also essential that notice of such disavowal by her of title as widow should be brought home to the heir.'"

And then we continued:

"But it was there also said that the widow might acquire title by adverse possession against the heir if her disclaimer and hostile possession was so open and notorious as to raise a presumption of notice to him."

In the case at bar, certainly the allegations (hereinafter to be discussed) in the 1920 suit between these parties constituted notice to Mrs. Gibbs that Mrs. Bates was claiming the fee title by adverse possession; so the rule of the foregoing cases is applicable if the 1894 deed be void insofar as Mrs. Bates is concerned.

On the other hand, if we say that the 1894 deed signed by Jett and wife was valid insofar as Mrs. Bates was concerned, then Mrs. Bates has all these years been a grantor remaining in possession of the property; and our cases recognize that such a person can acquire a title by adverse possession against the grantee by lapse of many years and notice of hostile holding. In Davis v. Burford, 197 Ark. 965, 125 S.W. 2d 789 we reviewed the cases involving a lapse of many years. In Stuttgart v. John, 85 Ark. 520, 109 S.W. 541, we recognized that if the occupancy and use of the premises by the grantor be manifestly inconsistent with that of the grantee, and notice of the hostility of the claim is brought home to the grantee, then the statute of limitations will be set in operation in favor of the grantor and against the grantee.

So, whether the deed from Jett and wife to Mrs. Gibbs in 1894 be valid or void—in either event—it was legally possible for Mrs. Bates, by remaining in possession and by presenting notice of adverse possession to

Mrs. Gibbs, to start the running of the statute of limitations in favor of Mrs. Bates and against Mrs. Gibbs. Our opinion in Gibbs v. Bates, *supra,* was rendered in 1921 and was the culmination of the suit that Mrs. Gibbs had instituted against Mrs. Bates in 1920. In the statement of facts in that opinion we said of Mrs. Gibbs: "Her complaint further states that Nora L. Bates makes an adverse claim to the land, ..."

Of Mrs. Bates' possession, we said: "The defendant claimed title by adverse possession. . . . . ."

Certainly, our opinion in 1921 showed that Mrs. Bates was claiming the title by adverse possession, and the result of that case clearly indicated that Mrs. Gibbs should have proceeded at law by action in ejectment if she desired to recover the premises. Instead, she did nothing from 1921 to 1948 so far as the record here shows. Mrs. Bates remained in possession, and has now filed suit to have her title quieted. In Cunningham v. Brumback, 23 Ark. 336, this Court adopted as its own the language of Judge U. M. Rose:

"The law wisely holds that there shall come a time when even the wrongful possessor shall have peace; and that it is better that ancient wrongs should go unredressed, than that ancient strife should be renewed."

Our statutes [2] and our cases [3] recognize that if a person takes possession of land and holds the same under a claim of ownership continuously, openly, adversely, etc., for more than seven years, then such person acquires a title by adverse possession and is entitled to prevail in an action to quiet title. That is the situation of Mrs. Bates in the case at bar. The Chancery Court granted her that relief, and we find the decree to be correct.

Affirmed.

George Rose Smith, J., dissenting. In 1894 appellant bought and paid for this land. Unfortunately for

[2] Sections 10958, *et seq.*, Pope's Digest and §§ 34-1901, *et seq.*, Ark. Stats. of 1947.

[3] Van Etten v. Daugherty, 83 Ark. 534, 103 S. W. 737; Elliott v. Pearce, 20 Ark. 508; Cofer v. Brooks, 20 Ark. 542; Pillow v. Roberts, 12 Ark. 822; Skipwith v. Martin, 50 Ark. 141; 6 S. W. 514; Hudson v. Stillwell, 80 Ark. 575, 98 S. W. 356.

her, the wife of her grantor was a minor at the time of the sale. In 1897 appellee elected to disaffirm the transaction and to retain possession under her dower and homestead rights. This possession is now declared by the majority to have ripened into title, although, as I shall endeavor to show, there has never been a time when appellant could have successfully asserted a right to possession.

I do not understand that the majority disagree with my view as to the effect of the occurrences before 1920. The appellee pleaded her minority in the 1897 action in ejectment. This was a sufficient disaffirmance. Williston on Contracts, § 231. We have held that a wife may disaffirm a release of dower executed during her minority and reassert her interest in the land. *Watson* v. *Billings,* 38 Ark. 278, 42 Am. Rep. 1. I think the same rule applies to the release of homestead in the rare cases, such as this one, in which the couple have not abandoned the homestead by termination of occupancy before the wife elects to disaffirm. Of course a husband's conveyance of the homestead is void if his wife does not join in the deed, while that is not true when she merely fails to release dower. But the conclusion reached in *Harrod* v. *Myers,* 21 Ark. 592, 76 Am. Dec. 409, in an analogous situation, is practically decisive as to the appellee's privilege of reasserting her homestead right.

Thus until 1920 the appellee's possession was by virtue of her homestead interest. (She also had unassigned dower in the land.) In the record before us, which includes by stipulation the proceedings in the earlier cases, there is nothing to indicate that before 1920 the appellee ever brought home to the appellant any notice of a claim of adverse possession. Her first assertion of an adverse holding was made in her answer in the 1920 suit, in which appellant sought to quiet her title to the land. The pivotal question in this case is whether appellee's plea of adverse possession in 1920 set the statute of limitations in motion. The majority say that in the face of that plea the appellant should have brought an action at law for possession. I am convinced that such an action would not have been successful.

In 1920 the appellee was vested with a homestead right for life; her dower interest was also a life estate, her husband's estate having been ancestral. The appellant owned the remainder. She brought suit to quiet title, the appellee interposing a plea of adverse possession. That case was not decided on the merits. It was enough to defeat equity jurisdiction for the appellee to show that she was in possession, whether adversely or not. Reference to the appellee's brief upon that appeal reveals that she was content to rely upon possession alone, regardless of its adverse character. In her brief she admitted that it was unnecessary for her to prove adverse possession, saying, "It is sufficient that appellant at the time of instituting her suit was not in possession of the property." All this court did was to agree with her contention.

In order to protect her rights it was not necessary that appellant bring a suit that she would have lost. "No one can be in default in not bringing an action which he could not have maintained, if brought." *Smith* v. *Maberry,* 148 Ark. 216, 229 S. W. 718. Had appellant brought ejectment within seven years after the plea of adverse possession was filed, she could have prevailed only if the appellee were estopped to claim her dower and homestead rights. Although one may be estopped by having taken a certain position in earlier litigation, it is necessary either that the party shall have prevailed by reason of that position or that his opponent shall have changed his own position in reliance thereon. Neither requisite is present here. The appellee won the 1920 case not because she pleaded adverse possession but because she proved her own actual possession. She had simply pleaded more than she had to prove to win her case. Obviously appellant has not changed her own position in reliance on the plea. Thus it is clear that appellant could not have maintained ejectment as long as the appellee had her life interest. It follows that the statute has never begun to run; so the decree should be reversed.

4-8915 222 S. W. 2d 809

Opinion delivered June 27, 1949.

Rehearing denied October 3, 1949.

[redacted]

Warren E. Wood and *Griffin Smith, Jr.*, for appellant.

Digby & Tanner, for appellee.

ED. F. MCFADDIN, Justice. This suit involves a building contract. On March 30, 1948, N. C. Withrow, Jr. (hereinafter called owner) entered into a contract with O. A. Wright (hereinafter called contractor) for the construction of a residence. Work began on April 1, 1948, and continued until some time in July, 1948, when the contractor left the job after the architect refused to allow the interior of the house to be plastered. On October 1, 1948, the owner filed this suit against the contractor, claiming damages in the sum of $4,564.01, and

seeking an injunction to prevent the contractor from filing a lien on the property. The contractor counterclaimed for $4,901.51, as the balance on the contract. Trial in the chancery court resulted in a decree awarding the contractor (1) a judgment for $4,652.81 and (2) a lien on the property for the payment of said judgment. To reverse that decree, there is this appeal.

The Contract provided, *inter alia:*

"The Contractor shall furnish all of the materials and perform all of the work shown on the Drawings and described in the Specifications entitled two (2) bedroom residence, as per plans and Specifications prepared by Nevil C. Withrow, Sr., with exceptions as noted on proposal dated February 6, 1948."

It is admitted by all parties that the contractor was not "to furnish all of the materials", even though so stated in the contract, since the Specifications and also the Proposal varied the quoted language. Section 6 of the Specifications, even as deleted when offered in evidence, showed the materials to be furnished by the owner to be: "Metal frames and trim; copper coat paper, thresholds; sliding door, tracks and hardware; aluminum sills; waterproofing and dampproofing; cement floor colors; plate glass settings; aluminum windows and screens; Zonolite concrete and plaster aggregate."

Furthermore, the Proposal of February 6, 1948, showed the following items to be furnished by the owner: "Metal door frames and trim; copper coat paper; thresholds; sliding door tracks and hardware; aluminum sills; waterproofing and dampproofing; cement floor colors; plate glass; window glass, glazing and setting; aluminum window trim and screens; Zonolite concrete and plaster aggregate; weather stripping; window cleaning; building paper; all cabinets; mirrors; fireplace dampers; insulation material; Parkay flooring and labor; electric wiring, fixtures and labor; heating system; landscaping."

The plans, Specifications and drawings were frequently changed by the architect, and during the course of the

work the owner paid the contractor a total of $3,854.15 on the contract and extras. From the inception of the work until the contractor left the job some time in July, there were ever recurrent changes in plans and also constant strife between the owner and architect on the one side, and the contractor and his workers on the other. The testimony is in the sharpest conflict as to who was at fault.

The architect is the father of the owner, and seems to have taken complete charge and acted both as architect and as owner in the place of his son, N. C. Withrow, Jr. At one time the owner asked one of the workmen why something was being done which was a change in the plans; and when the workman advised the owner that Mr. Withrow, Sr., had ordered the change, then the owner replied: "Well, don't ever ask me another thing about the job. I am washing my hands of it. If he is going to handle it, let him handle it." In July when the contractor was ready to commence plastering the interior, Mr. Withrow, Sr. forbade the plastering, and thereupon the contractor left the job and the owner had the residence completed by another builder. Appellants urge six assignments for reversal.

Assignment number one relates to some language of the trial court regarding the Proposal not being a part of the contract. We fail to see how the appellant was prejudiced in any wise by this statement of the trial court, because the Proposal lists many more items to be furnished by the owner than were carried forward into the Specifications. We have previously detailed these items. Including the Proposal as a part of the Contract does not improve the case for the appellant.

Assignments numbers two, three and six relate, ultimately, to the fact that the Court accepted the contractor's version of the facts, rather than the owner's, and rendered judgment against the owner for $4,652.81. As previously stated, the evidence was in the sharpest dispute; and to review the testimony of each witness would serve no useful purpose. We cannot say that the Chancery Court's decree is contrary to the preponder-

ance of the evidence as regards the amount of the judgment.

Assignment number four complains of that portion of the Court's language in the decree which recites: " . . . that the architect was prejudicial, biased and partial in his supervision, criticism and rejection of the construction; . . ." While the quoted language may appear to be harsh, yet it must be remembered that the architect is the father of the owner, and it is but natural that a father would honestly view any transaction in a light more favorable to his son than to a third party. From a reading of the entire evidence we understand the language of the trial court to mean that N. C. Withrow, Sr. acted more as the father of N. C. Withrow, Jr., than as an impartial architect. Such a statement was not intended as a reflection on Mr. Withrow, Sr.; but as a statement of facts borne out by the evidence.

Appellants' assignment number five relates to that portion of the decree which awarded the contractor a lien on the building and land for the *full* amount of his judgment; and the appellants are partially correct in this assignment. There was no lien agreed to in the Contract between the parties, so the only lien the contractor could possibly claim is one arising either by equitable subrogation or by statute. What we will now say concerning the statute gives the contractor all of the relief he could claim under equitable subrogation—so we need not decide whether such doctrine is applicable.

Our statutes (§§ 8865, *et seq.*, Pope's Digest, and §§ 51-601, *et seq.*, Ark. Stats. of 1947) give a lien for work done or materials furnished. In Shaw v. Rackensack Apt. Corp., 174 Ark. 492, 295 S. W. 966,[1] we held that the contractor who furnished materials and paid labor bills was entitled to a lien for such amounts; and when the contract required the contractor to furnish all labor and materials under his contract, he was entitled to a lien for the balance due him under the contract when he had performed it. In Cook v. Moore, 152 Ark. 590, 239

[1] In the later case of Halbert & Son v. Baker, 176 Ark. 971, 4 S. W. 2d 1 we reaffirmed the fact that a contractor was entitled to a lien in the circumstances there shown.

S. W. 750, we held that the contractor was not entitled to a lien for his profits over and above the bills for labor and materials. In the application of these holdings to the case at bar, it is evident that Wright is entitled to a lien for the amounts he paid for labor and materials that actually went into the construction of the building; but he is not entitled to a lien for his profits. From the evidence before us, it is impossible to determine how much Wright actually paid for labor and materials that went into the construction of the building. He testified that he had paid all bills incurred by him, except one; but the amounts so paid were not segregated from the overhead profit, and in several instances, the exhibits indicate "20% added."

We therefore hold that under our statutes Wright is entitled only to a lien for the amounts he paid for labor and materials that actually went into the construction of the building. This part of the cause must be remanded for such amount to be determined.

In all respects, except as to the lien question, the decree of the Chancery Court is affirmed. As to the lien question, the decree is in part reversed, and the cause remanded for further proceedings not inconsistent with this opinion. All costs are taxed against the appellants.

Griffin Smith, C. J., not participating.

HADAWAY *v.* STATE.

4564 222 S. W. 2d 799

Opinion delivered June 27, 1949.

Rehearing denied October 3, 1949.

Byron Goodson, for appellant.

Ike Murry, Attorney General and *Robert Downie,* Assistant Attorney General, for appellee.

HOLT, J. A jury convicted appellant, Hadaway, of aggravated assault (Ark. Stat. 1947, § 41-605) and assessed his punishment at twenty days imprisonment in the County Jail and a fine of $100. From the judgment is this appeal.

For reversal, appellant argues: (1) that the evidence was insufficient to support the verdict, and (2) that the court erred in giving, over his objections, State's Instruction No. 2.

(1)

December 24, 1948, Doug Kimmey and a companion by the name of Rowe, while traveling in an automobile driven by Rowe, collided with another car in the outskirts of Lockesburg. Both (Kimmey and Rowe) were intoxicated. A police officer came on the scene. While he, Kimmey, Rowe and the driver of the other automobile were discussing the incident, Kimmey walked away and entered a pool hall nearby, where the officer found him talking to appellant, operator of the pool hall. For some reason, not made clear, appellant and Kimmey became involved in a fight. Kimmey knocked appellant down. Appellant got up and advanced on Kimmey with a knife, struck him several times, cutting him on his arm and wrist. At this point, a bystander knocked Kimmey down and while he lay on the floor, appellant evaded the officer and kicked Kimmey twice in the face, before the officer succeeded in subduing him.

A witness testified: "What was Doug (Kimmey) doing at the time he was struck with the knife? A. It appeared to me like he might back up. * * * Q. What did the defendant (Hadaway) say shortly after he struck Doug with the knife? A. I tried my best to cut the s. of a b. all to pieces."

Without attempting to detail all the testimony, the above evidence was substantial and sufficient, when considered in the light most favorable to the State, as we must, to show that appellant "without considerable provocation," with "an abandoned and malignant disposition," assaulted Kimmey with a deadly weapon with the intent to inflict bodily injury, and warranted the jury's verdict. *Allgood* v. *State,* 206 Ark. 699, 177 S. W. 2d 928; *Bennett and Holiman* v. *State,* 201 Ark. 237, 144 S. W. 2d 476, 131 A. L. R. 908; and *Holland* v. *State,* 198 Ark. 933, 132 S. W. 2d 190.

(2)

There was no error in giving State's instruction No. 2, in the circumstances. This instruction provided: "No one is allowed to exercise the right of self-defense if he willingly enters into the fight or combat; and, if you find and believe from the evidence that the defendant willingly entered into the combat with Doug Kimmey, he cannot avail himself of the plea of necessary self-defense to justify an assault with a knife or other deadly weapon."

No specific objection was made to this instruction. Appellant objected "generally to each and every given State's instruction."

The record reflects that, along with correct instructions given by the court, at appellant's request, the court properly told the jury: "You are instructed that the defendant was entitled to act upon appearance and if the language and conduct of Doug Kimmey was such as to induce in the mind of a reasonable man without fault or carelessness upon his part, under all the facts and circumstances then existing, and viewing them from the standpoint of the defendant, a fear that great bodily harm was, at the time of the assault, about to be inflicted by Doug Kimmey on the defendant, it does not matter if such danger was real or only apparent if the defendant acted in his necessary self-defense from real and honest conviction as to the character of the danger, if any, your verdict should be for the defendant."

Instruction No. 2 was not inherently wrong. Appellant made no request, as noted, for clarification. An instruction similar, in effect, was approved by this court in *Lomax v. State,* 165 Ark. 386, 264 S. W. 823. The following from that opinion applies with equal force here: "The instruction, when considered as a whole, does not assume any fact, but it leaves it to the jury to find whether the defendant voluntarily entered into the difficulty, and also whether or not he killed the deceased. The instruction simply tells the jury that, if he voluntarily entered into the difficulty and killed the deceased, he cannot avail himself of the plea of self-defense, and cannot take advantage of the necessity brought about by his own unlawful act. In other words, it tells the jury that, if the killing resulted from a voluntary quarrel and mutual combat entered into by the parties, this would be a wrongful act, and the defendant could not avail himself of the plea of self-defense."

So here, Instruction No. 2, in effect, told the jury that if appellant willingly, or voluntarily, entered into combat with Kimmey this would be a wrongful act and, in the circumstances, appellant would not be permitted to exercise the right of self-defense.

No error appearing, the judgment is affirmed.

SCHUMAN *v.* WILSON.

4-8902 222 S. W. 2d 798

Opinion delivered June 27, 1949.

Rehearing denied October 3, 1949.

Wm. J. Kirby, for appellant.

M. A. Matlock, for appellee.

GRIFFIN SMITH, Chief Justice. January 2, 1947, Florence Schuman purchased from the State Land Commissioner the south 45 feet of Lots 7 and 8, Block 16, Bowman's Addition to Little Rock. The property forfeited for 1943 taxes, penalty and cost, under an assessment of $560. As certified to the State the amount due was $30.61. In addition to the 1943 item, the purchaser paid taxes for three additional years.

In April, 1947, W. P. Wilson, as record owner, brought an action to cancel the Commissioner's deed, the general allegations being that, in the absence of confirmation, it was voidable because of irregularities. These contentions were upheld in a decree quieting title in Wilson insofar as title was affected by the State deed. Mrs. Schuman has appealed.

Wilson acquired the property August 7, 1942, through quitclaim deed from Little Rock Investment Company. Taxes for 1942 were not paid, and when forfeiture occurred the State purchased. The lots were included with other tracts redeemed February 3, 1944, as shown by the treasurer's receipt. When Wilson dealt with the County Clerk January 28 and procured a redemption certificate and treasurer's receipt form listing forfeitures in which he was interested, the 1943 tax books had been certified to the Collector and did not include the property in question. However, Wilson testified that at that time he added to his payment an amount equal to the first installment on these lots for 1943, although the tax books were not available and time for payment did not accrue until the third Monday in February.

Section 13868 of Pope's Digest, Ark. Stats. 84-1210, permits redemption within two years by payment of cost

and penalty, "and the taxes which would have accrued thereon if such land or lot had been continued on the tax books".

It thus appears that the Clerk's certificate should have included taxes for 1943. Instead, when the tax books were sent to the Collector, the Clerk listed the property forfeited. A red ink entry by the Collector based upon what was termed a Clerk's warrant showed a valuation of $560 and taxes of $27.33.

This practice of assessing is attacked by appellee, who thinks the warrant system—not sanctioned by law—is such a material variation from the statutes as to invalidate the sale. It is not necessary to pass upon this phase of the controversy. In her brief appellant says: "*Wilson paid the first installment of the 1943 taxes on this property and then allowed it to forfeit for the balance*". The Land Commissioner's records show that the lots were sold for a State tax of $22.29, and County tax of $5.04, or $27.33. Credit should have been given for the first installment of one-fourth. Since the sale was for $6.83 more than the unpaid tax, the Land Commissioner's deed was properly set aside.

Affirmed.

BAUTTS *v.* SHACKLEFORD MOTOR COMPANY.

4-8925 221 S. W. 2d 794

Opinion delivered July 4, 1949.

P. A. Deisch and *Dinning & Dinning,* for appellant.

A. M. Coates, for appellee.

Ed. F. McFaddin, Justice. Appellant, by action of replevin, sought to recover a Ford automobile from appellee. The Circuit Court trial resulted in a jury verdict; and judgment for appellee, and appellant now urges two assignments for reversal.

I. *Sufficiency of the Evidence.* Will Benson, a negro sharecropper on appellant's farm, owned an old model Dodge car on which appellant held a bill of sale as security. Benson desired to trade the old car for a new model Ford owned by appellee. A trade was made whereby appellant surrendered her claim on the old car and issued a check to appellee for $700. The testimony is in agreement as to these facts; but a sharply disputed question of fact is presented as to the remaining terms, if any, of the trade.

Appellant testified that the $700 check and the old car were to be in full payment for the new Ford, and that appellee therefore had no claim on the Ford, to which appellant claimed title. Appellee's witnesses testified that. in addition to the old car and the $700. there was a balance of $150 due appellee for the new Ford; and that Will Benson had signed a conditional sales contract for said $150 and carrying charges. The contract was introduced in evidence, and Benson reluctantly admitted that he had "signed some papers." As aforesaid, the evidence was in sharp dispute as to what the agreement was between appellant and appellee. There was sufficient evidence to support a verdict for either party; and the decision by the jury settles the fact question.

II. *Instructions.* In appellant's instruction No. 1 the Court told the jury: "If you find from the evidence that the automobile in controversy is the property of the plaintiff, Miss Bautts, you will find for the plaintiff for the recovery of the property; and you will also find for the value of the auto in controversy in the event its recovery cannot be had; and also the damage suffered by plaintiff by reason of its detention."

Appellant now complains of the refusal of the Court to also give appellant's instruction No. 2, which reads: "If the jury believe from the evidence that Miss Beulah Bautts had an interest in the automobile involved in this case, coupled with the right to take possession and control the same, at the time of the commencement of this action, they must find for the plaintiff, though they may believe from the evidence that other parties had an ultimate interest in an account concerning it."

The Court committed no reversible error in refusing this instruction. The controversy was between appellant and appellee; and the concluding language in the refused instruction (i. e., "although they may believe from the evidence that other parties had an ultimate interest in an account concerning it") was misleading and uncertain. An instruction subject to these vices should not be given.[1] Insofar as the requested instruction was a correct declaration of law, it was a duplication of instruction No. 1, which was given; and insofar as the requested instruction No. 2 was broader than instruction No. 1, it was misleading and uncertain.

Affirmed.

O'MEARA *v.* BEASLEY.

4-8857 221 S. W. 2d 882

Opinion delivered July 4, 1949.

[1] See Helena Gas Co. v. Rogers, 104 Ark. 59, 147 S.W. 473 and other cases collected in West's Ark. Digest, Trial, § 242.

J. Ed Morneau, for appellant.

MINOR W. MILLWEE, Justice. Appellant, Robert W. O'Meara, was drilling for oil at a location in Little River county about eight miles north of Texarkana, Arkansas, in August, 1946. Hershel L. Williams, Clyde Redl, Noel A. Beasley, and F. G. Tisdale, members of the drilling crew, had started to work in Williams' automobile with Redl driving about 11:00 p. m. August 21, 1946, when the car in which they were riding collided with another automobile resulting in Williams' death and injury to the other three occupants.

Claims for compensation benefits were filed with the Workmen's Compensation Commission by Hershel Williams' widow and the three injured employees. The commission found that the death of Williams and the injuries sustained by the other claimants did not arise out of and in the course of their employment and said claims were denied after hearings before one commissioner and the full commission.

On appeal to circuit court, the findings and order of the commission were reversed and compensation in the amount of $7,000 was ordered paid in a lump sum to the widow of Hershel L. Williams and the other three claims were remanded to the commission to determine the sole question of the amount of compensation due them. The employer and his insurance carrier have appealed.

After extensive findings of fact, the commission reached the following "conclusions of law": "Claimants contend that they are entitled to compensation benefits because they were injured at a time and in such a man-

ner that it could be said that their injuries arose out of and occurred in the course of their employment. We do not agree with this contention. From the evidence presented in this case it appears that these employees were injured in an automobile accident at the intersection of 9th and Hickory streets in the city of Texarkana, Arkansas, several miles from the site of their employment which was an oil well some distance from the city of Texarkana. The employees at the time of the injury were en route to work and, construing the evidence in the most favorable light for these claimants, it may be conceded that they were following the most direct route to the site of their employment, deviating from this route only when necessary to pick up various employees at their homes.

"The general rule is that injuries occurring to employees en route to or from their employment and outside the premises of their employer are not compensable under the law. Claimants argue, however, that this case falls within an exception to that general rule in that they were being transported to their work by their employer. This Commission has always recognized that injuries received while being transported to and from one's employment by the employer are compensable and we feel that such is a valid and legal exception to the general rule regarding the coming and going of employees. Claimants here, however, have failed to show that their transportation was being furnished by their employer. It may be that Mr. Beasley, the drilling foreman, considered the fact that Hershel Williams owned an automobile as a factor in his decision to employ him, but he did not show that the employer paid for this transportation in any way. Furthermore no showing was made, although it was attempted, that it was customary in the oil drilling industry to furnish transportation to the employees. The one witness who testified regarding this custom remembered that oil drilling companies formerly furnished such transportation, but at that time the employees had to pay nothing for it. The witness 'understood' that later the companies had abandoned this practice. The evidence here does show that these em-

ployees had entered into a 'car pool' among themselves, an arrangement which was common during the war when there was a shortage of gasoline and automobile tires. Proof presented is that they themselves provided the transportation due to the fact that Williams owned an automobile and the other employees, including Mr. Beasley the foreman, were to pay a small sum each week for the transportation expenses. The fact that Mr. Beasley was a foreman and had himself entered into this car pool cannot impute the whole responsibility of the transportation to this employer.

"Roy Beasley, the driller, and G. H. Saeler, both testified that O'Meara did not agree to furnish transportation. Mr. Saeler further testified that O'Meara had never furnished transportation—that it was up to the driller and his crew to get to the job. The men's pay began when they reached the job and ended when they left the job. No extra pay was given the driver of the car transporting the men, and the driller had no authority to obligate O'Meara for transportation."

One of the exceptions to the general rule that an employee is not in the course of his employment while going to, or returning from, work is that arising where the transportation to and from the place of employment is furnished by the employer as an incident of the employment. This exception was recognized in *Hunter* v. *Summerville,* 205 Ark. 463, 169 S. W. 2d 579, where a timber contractor acquiesced in the custom of employees riding to and from the log woods on trucks of a subcontractor whose compensation insurance was paid by the contractor. In *Blankenship Logging Co.* v. *Brown,* 212 Ark. 871, 208 S. W. 2d 778, an award of compensation was upheld where there was substantial evidence to establish at least an implied agreement by the employer to furnish transportation to the injured employee when the vehicle was supplied by the employer for the mutual benefit of himself and the workmen.

In *Stroud* v. *Gurdon Lumber Co.,* 206 Ark. 490, 177 S. W. 2d 181, and *Cerrato* v. *McGeorge Contracting Co.,*

206 Ark. 1045, 178 S. W. 2d 247, the employer was held not responsible for an injury sustained by an employee in traveling to and from the place of work in the absence of an express or implied agreement on the part of the employer to furnish such transportation. The distinction between these cases and the case of *Hunter* v. *Summerville, supra,* was pointed out in the Cerrato case as follows: "In the Hunter case, as is pointed out in the opinion in the Stroud case, the employer had agreed to furnish transportation to the employee to and from his work, and the injury was sustained while the transportation was being provided. But here, as in the Stroud case, there was no such agreement. Cerrato furnished his own transportation to and from his work. He was riding in the truck of a fellow-employee, who was furnishing transportation for both, upon a public highway, four hours after he had ceased working for his employer, at a distance of about three and one-half miles from the place of his employment, and was killed by coming in contact with a live wire lying across a public road, which was as much a peril to other users of the road as it was to Cerrato and his companions.

"In the Stroud case, we quoted, with approval, from an opinion of the Supreme Court of Oklahoma in *Indian Territory Illuminating Oil Co.* v. *Gore,* 152 Okla. 269, 4 Pac. 2d 690, the statement that 'In the absence of an agreement, express or implied, to transport an employee to the place of work, the employer is not responsible for an injury sustained by the employee in traveling to the place of work,' and the rule would not be different if the employee were traveling from his place of work, as was Cerrato."

We have carefully reviewed the evidence before the commission. The findings of the commission are supported by substantial, if not undisputed, evidence to the effect that there was neither an express nor implied agreement on the part of the employer, O'Meara, to furnish transportation to members of the drilling crew. While there was some evidence that the driller hired Williams because he had a car, there is an absence of

 [redacted]

proof that either the driller or any other agent of the employer agreed to pay for transportation or that the employer ever followed a custom of doing so.

We conclude that the evidence supports the findings of fact and conclusions of law made by the commission, and that the circuit court erred in failing to so hold. The judgment is, therefore, reversed and the cause remanded with directions to affirm the findings and order of the Workmen's Compensation Commission.

[redacted]

WINKLE *v.* SCHOOL DISTRICT No. 81, INDEPENDENCE COUNTY.

4-8932 221 S. W. 2d 884

Opinion delivered July 4, 1949.

[redacted]

R. W. Tucker, for appellant.

Chas. F. Cole, for appellee.

HOLT, J. April 13, 1948, by proper court order, School District No. 53 of Independence County was con-

solidated with appellee, School District No. 81 of that county.

June 10, 1907, C. H. Gunther and wife conveyed by warranty deed to School District No. 53 approximately one acre of land out of a 140 acre tract which they owned. This deed provided: "Said School District is to have and to hold said lands as long as they use it for school purposes and when it is not so used it is to revert back to the above described land of which it is a part, and it is further agreed that said district shall allow all denominations to preach in there as long as one may use it."

The original 140 acre tract was later conveyed by the Gunthers to H. F. Caterlin who afterwards conveyed to appellant, Winkle, and wife. In neither of these deeds was there any mention of the prior conveyance of the one acre tract to the School District, but both deeds undertook to convey the entire 140 acre tract.

Following the consolidation of the two districts, and at the end of the school term then in progress, appellee removed the seats and school furnishings from the school house in former district No. 53, and immediately appellant took possession of the one acre tract and the building and claimed and asserted title and ownership.

August 28, 1948, appellee District, filed the present suit in equity, in which it alleged, in effect, that appellant, Winkle, was in possession of the one acre tract and building in question, that it (appellee) was the owner, held title and was entitled to possession, that appellant was holding possession without right, and prayed that he be restrained from interfering with appellee's right to said premises, that he be required to restore the property to its former condition, for damages, and other equitable relief.

Appellant answered with a general denial, alleged that he held possession, title and ownership, that equity was without jurisdiction, that the action was one solely in ejectment, and petitioned the court to transfer the cause to the Circuit Court for trial.

Upon a hearing, the trial court denied appellant's petition to transfer the cause to the Circuit Court and proceeded to determine the issues. This was error.

This action was in ejectment and appellee had a full and complete remedy at law. Both parties were claiming title to the one acre tract and building in question, and the right to possession. It is undisputed that appellant was in actual possession and control when the suit was brought. He, therefore, had the constitutional right to demand that the issues be tried in a court of law. No equitable issue was involved. The question of title was purely a legal one.

"The equity jurisdiction to quiet title, independent of statute, can only be invoked by a plaintiff in possession, unless his title be merely an equitable one. The reason is that where the title is a purely legal one and some one else is in possession, the remedy at law is plain, adequate and complete, and an action of ejectment can not be maintained under the guise of a bill in chancery. In such case the adverse party has a constitutional right to a trial by a jury." *Pearman* v. *Pearman,* 144 Ark. 528, 222 S. W. 1064.

These principles of law have been carried through our decisions and reaffirmed in *Fisk* v. *Magness,* 193 Ark. 231, 98 S. W. 2d 958; *Patterson* v. *McKay,* 202 Ark. 241, 150 S. W. 2d 196; *Rice* v. *Rice,* 206 Ark. 937, 175 S. W. 2d 201, and *Lowe* v. *Cox,* 210 Ark. 169, 194 S. W. 2d 892. The latter case appears to be the last expression of this court on these principles.

For the error indicated, the decree is reversed and the cause remanded with directions to sustain appellant's petition to transfer the cause to the Circuit Court for trial.

PRUITT *v.* SEBASTIAN COUNTY COAL & MINING CO.

4-8773 222 S. W. 2d 50

Opinion delivered July 4, 1949.

Bates, Poe & Bates, for appellant.

Pryor, Pryor, Dobbs & Barham, for appellee.

ED. F. MCFADDIN, Justice. In what was commenced as a simple suit to enjoin a trespass on land and to recover damages, there has been injected the question of the correct boundary line between Scott and Sebastian Counties; and this boundary line question, like Banquo's ghost, "will not down." It turns up at every angle of this litigation.

The appellee, Sebastian County Coal & Mining Company, filed suit in the Sebastian Chancery Court claiming ownership of the following lands alleged to be in Sebastian County, Arkansas, to-wit: "The NW¼ NW¼ Sec. 5, Twp. 3 N., R. 32 W.; and NE¼ NE¼, Sec. 6, Twp. 3 N., R. 32 W.; and the Frl. N½ Sec. 1, Twp. 3 N., R. 33 W."

The complaint alleged that the defendant John Pruitt (appellant here) had trespassed on the lands and had cut and removed timber therefrom. The prayer was for injunction and damages. The defendant Pruitt admitted that he had cut and removed the timber from the lands, but claimed by proper pleadings (1) that the lands were in Scott County and therefore the Sebastian Chancery Court was without jurisdiction; and also (2) that he held under a tax title (based on a Scott County forfeiture) which he claimed to be superior to the plaintiff's claim of title.

This was a local action under § 1386, Pope's Digest, which requires such an action to be prosecuted in the county in which the land is situated.[1] Even if they had desired—which they did not—the parties could not by consent have conferred jurisdiction of the subject matter in this case.[2]; so the jurisdictional and sharply contested issue was whether the lands were in Scott or Sebastian County. The Chancery Court held that they were in Sebastian County, and awarded plaintiff the injunction and damages. The defendant has appealed.

[1] See Drainage Dist. v. Hutchins, 184 Ark. 521, 42 S.W. 2d 996.
[2] Mo. Pac. R. Co. v. Henry, 188 Ark. 530, 66 S.W. 2d 636.

We find that this Court on previous occasions has decided county boundary line issues in suits between individuals. Bittle v. Stuart [3] was a suit between private litigants (as distinguished from a *quo warranto* proceeding or an action between disputing counties); and this Court, in an opinion by Mr. Justice EAKIN, determined the validity of a legislative enactment concerning the boundaries and the territory embraced in Clark County. Reynolds v. Holland [4] was a suit between private litigants; and this Court—again speaking by Mr. Justice EAKIN—determined the location of the boundary line between counties. Crawford v. Brown [5] was a private action to recover land alleged to be in Clark County. The defense was that the land was in Hot Spring County; and this Court, by Mr. Justice RIDDICK, in deciding the issues, necessarily determined a disputed county boundary question. In Crow v. Roane [6] this Court, speaking by Mr. Justice MCCULLOCH, settled the boundary line between Miller and Little River Counties, in litigation between individuals. Until the Legislature provides that an adjudication of county boundary lines be determined only in a proceeding in which the interested counties be parties, or in which the State act by *quo warranto,* the cases heretofore cited are precedent and authority for a county boundary line dispute to be indirectly adjudicated in a suit between individuals.[7]

Each side has presented the case with skill and care. Along with the oral testimony, 50 exhibits were introduced, including more than 20 maps. Before we proceed to consider the question here presented—that is, the boundary line between Scott and Sebastian Counties in ranges 31, 32 and 33 west—we state facts necessary to present the contentions.

[3] 34 Ark. 224.

[4] 35 Ark. 56.

[5] 74 Ark. 568, 86 S.W. 425.

[6] 86 Ark. 172, 110 S.W. 801.

[7] Sections 17-103 to 17-108 (inclusive) Ark. Stats. of 1947, and also sections 2380 to 2385 (inclusive) of Pope's Digest come to us from Chapter 37, secs. 1 to 6 (inclusive) of the Revised Statutes of 1837, and provide how counties may have boundary lines surveyed; but these provisions have not prevented the adjudication of county boundaries in private litigation, such as is the case at bar.

Scott County was created from parts of Crawford and Polk Counties by Act of the Arkansas Territorial Legislature of November 5, 1833;[8] and that Act fixed—insofar as is here involved—the north boundary of Scott County to be "the line between Townships 3 and 4 North of the Base Line." In other words, north of Scott County was Crawford County, and the north boundary line of Scott County in Ranges 31, 32 and 33 was the north line of Township Three. The Arkansas Territorial Legislature on October 24, 1835 [9] adopted an Act enlarging the boundaries of Scott County; and the General Assembly of the State of Arkansas on December 16, 1838 [10] adopted an Act more particularly defining the line between the Counties of Scott and Crawford. The north line of Scott County, insofar as is here involved, remained as established by these three Acts (November 5, 1833; October 24, 1835 and December 16, 1838) until the creation of Sebastian County.

Sebastian County was created from parts of Crawford, Polk and Scott Counties by the Act of the General Assembly of January 6, 1851.[11] That Act took a strip of land off of the west side of Scott County about 13 miles east and west, and about 18 miles north and south; and all of such territory so taken in Ranges 31, 32 and 33 was *south* of the north line of Township Three. The taking of this territory from Scott County by the Act of 1851 is claimed by the appellant to have been unconstitutional; and this will be discussed in topic I.

The ordinance of June 1, 1861, of the Arkansas Secession Convention returned to Scott County all of Sebastian County that was *south of the Poteau Mountain.* Appellee claims that this ordinance definitely established the boundary line between Scott and Sebastian Counties to be the top of the Poteau Mountain; but the appellant claims that the description in this 1861 or-

[8] See p. 98 of Acts of the General Assembly of the Territory of Arkansas of 1833.

[9] See page 16 of the Acts of the Arkansas Territory of 1835.

[10] See p. 81 of the Acts of the General Assembly of the State of Arkansas of 1838.

[11] See page 81 of the Acts of the General Assembly of the State of Arkansas of 1851.

dinance was too indefinite to be valid. Discussion of this ordinance is contained in topic II.

The aforementioned Acts of 1851 and 1861 are apparently the only legislative enactments which attempted to fix the boundary between Scott and Sebastian Counties; but the appellant lists a number of subsequent Acts which he claims constitute recognition of the questioned boundary line to be the north line of Township Three. These various Acts cited by the appellant, as well as his other contentions will be discussed in topics III and IV.

What we are really required to decide is whether the lands described in the complaint in this case are in Sebastian County; but to decide that question we must necessarily decide the larger question as to the boundary line between Scott and Sebastian Counties in Ranges 31, 32 and 33 West. The territory drawn into dispute in this case is all of the land (approximately 3800 acres) that lies south of the north line of Township Three and north of the center ridge line of the Poteau Mountain. Roughly, it is a triangular area beginning on the Arkansas-Oklahoma boundary line, and being approximately two miles wide north and south, and extending easterly and north of the top of the Poteau Mountain range to the point where that mountain range crosses the north line of Township Three. A diagram showing the area is attached to this opinion. It is appellant's contention that the Scott County line extends due east and west along the north line of Township Three, just as stated in the Act of 1833 creating Scott County. It is the appellee's contention that the Scott County line extends along the high point of the Poteau Mountain range, as stated in the Act of 1861. With the contentions thus stated, we now consider the topics as previously indicated.

I. *The Act of 1851 Creating Sebastian County.* Art. IV, § 29 of the Constitution of 1836 (in force in 1851) provided: "No County now established by law shall ever be reduced by the establishment of any new county or counties to less than 900 square miles, . . ."

Appellant says that by the Act of 1851—creating Sebastian County—territory was taken from Scott County to such a great extent that what remained was in fact less than 900 square miles. Here is appellant's language on this point:

"Appellant relies on the fact that the Act of 1851, creating Sebastian County, was unconstitutional and, therefore, a nullity, to that part which proposed to take a part of Scott County, a county established at the adoption of the Constitution of 1836, and add the same to Sebastian County, a new county; because, in doing so, the Act would reduce the area of Scott County below the constitutional limit of 900 square miles. Therefore, the boundary line, with reference to Sections 5 and 6 of Township 3 North, Range 32 West, and Section 1 in Township 3 North, Range 33 West, would be the township line between Townships 3 and 4 North as established in the Act of 1833, originally establishing Scott County."

A determination of how many square miles of territory were left in Scott County *after* the creation of Sebastian County, necessitates a study of the Act of November 5, 1833 (creating Scott County), with the territorial changes made by the Acts of October 24, 1835; December 16, 1838; December 5, 1840; January 2, 1845, and January 6, 1851. Judicially, we know the county boundaries;[12] and it is our conclusion that there remained in Scott County after the creation of Sebastian County in 1851, an area in excess of 972 square miles. This is true, because the Act of October 24, 1835 [13] had enlarged Scott County. This Act was not discussed in any of the briefs on this case. The territory given Scott County by the said Act of October 24, 1835, remained a part of Scott County until Sarber County (now Logan County) was organized by the Act of the General Assembly of March 22, 1871.[14] So, on the fact question, it appears that Scott

[12] Crow v. Roane, 86 Ark. 172, 110 S.W. 801; Cox v. State, 68 Ark. 462, 60 S.W. 27.

[13] See p. 16 of the Acts of the Arkansas Territorial Legislature of 1835.

[14] See Act 25 of the General Assembly of Arkansas of 1871.

County did have more than 900 square miles of territory remaining after the Act of January 6, 1851, had created Sebastian County; and therefore Scott County is in no position to complain about the unconstitutionality of the said Act.

But, even assuming—for the purposes of further answer to appellant's argument—that Scott County did in fact have less than 900 square miles of territory remaining after the creation of Sebastian County by the Act of January 6, 1851, nevertheless, the diminution of territory of Scott County to less than 900 square miles did not appear on the face of the Act of January 6, 1851,[15] and that Act was allowed to go into effect. So far as the record here discloses, and so far as our additional research has revealed, this is the first litigation challenging the validity of the Act of 1851. Sebastian County began to function as a county in 1851, and has so continued ever since.

The provision of Art. IV, § 29 of the Constitution of 1836—concerning a minimum of 900 square miles for a county, as previously copied—was changed by subsequent Constitutions,[16] so that in the Constitution of 1874 (present one) the provision makes the minimum 600 instead of 900 square miles. Furthermore, the Constitution of 1874 recognized in several places the existence of Sebastian County;[17] and schedule I to the Constitution of 1874 says:

"All laws now in force which are not in conflict or inconsistent with this Constitution shall continue in force

[15] See Greene County v. Clay County, 135 Ark. 301, 205 S.W. 709, in which this Court refused to hold void an enactment because the Act did not disclose on its face that less than 600 square miles remained.

[16] The Constitution of 1861, Art. IV, § 28 said: "No county now established by law shall ever be reduced by the establishment of any new county or counties to less than 625 square miles . . ." The Constitution of 1864, Art. IV, § 27 said: "No county now established by law shall ever be reduced, by the establishment of any new county or counties, to less than 600 square miles . . . ." The Constitution of 1868, by Art. XV, § 12, used the same figure of 600 square miles, as does also the present Constitution of 1874, by Art. XIII, § 1.

[17] Art. XIII, § 5 allowed Sebastian County to have two districts.

Art. XVIII named Sebastian County.

Art. VIII, § 1 provided that Sebastian County should have a representative.

until amended or repealed by the General Assembly, . . ."

The Act of 1851 (as modified by the Act of 1861 subsequently to be mentioned) was in force at the time of the adoption of the Constitution of 1874 and was not inconsistent with that Constitution.

Again assuming that the Act of 1851 originally had been susceptible of being defeated by Scott County under the provisions of the Constitution of 1836, nevertheless, our Court files do not disclose that any such effort was ever made. We find no adjudication of unconstitutionality of the Act of 1851 at the time that the Act might have been held to be unconstitutional. Instead, the constitutional minimum was itself reduced, and Scott County will have more than 600 square miles of territory, even after the result of the present litigation is announced.

The actual existence of the Act of 1851 is an operative fact, and has had consequences which cannot be justly ignored.[18] The past cannot be erased now by a judicial declaration at this late hour; so we hold that the question of the constitutionality of the Act of 1851 comes at least 65 years too late, since the Constitution of 1874 cured the then unchallenged defect in the Act of 1851.

II. *The Act of 1861.* After the Act of 1851 creating Sebastian County, the next legislation affecting the boundary line between Scott and Sebastian Counties was the ordinance of June 1, 1861, of the Arkansas Secession Convention. The historical background of this Act is necessary in considering its legality. On January 15, 1861, the General Assembly of Arkansas adopted an Act directing the Governor of the State to call a General Election to be held on February 18, 1861, so that the People of the State could vote for or against a secession convention, and could select delegates from each county. The election was called, and resulted in an affirmative vote for such convention, and the naming of delegates. Accordingly, the Arkansas Secession Convention met at

[18] This language is paraphrased from that of Chief Justice HUGHES, found in the case of Chicot County Drainage District v. Baxter St. Bk., 308 U.S. 371, 84 Law Ed. 329.

the State Capitol on March 4, 1861; adopted a resolution of secession; and drafted the Constitution of 1861. Also, the same convention at a later date passed a number of laws—each called an "Ordinance"—dealing with matters entirely domestic and not concerned in any wise with the waging of the war for secession. Among other such domestic ordinances, there was the one of June 1, 1861,[19] concerning the boundary between Scott and Sebastian Counties, section 1 of which reads:

"That all that part of Sebastian County lying south of the Poteau Mountain, and taken from the County of Scott for the purpose of creating the County of Sebastian, be, and is, hereby attached to and made a part of the County of Scott."

Neither party to this present litigation has raised any question about the legality *per se* of this ordinance of the Arkansas Secession Convention of 1861; but we point out that in the case of Baldy v. Hunter,[20] Mr. Justice HARLAN, speaking for the Supreme Court of the United States, said:

". . . judicial and legislative acts in the respective states composing the so-called Confederate States should be respected by the courts if they were not 'hostile *in their purpose* or mode of enforcement to the authority of the national government, and did not impair the rights of citizens under the Constitution.' "

That opinion discussed in a scholarly manner the validity of the Acts of the Legislatures and of the judgments of the Courts in the various Confederate States during the War Between the States; and under the holding in Baldy v. Hunter, *supra,* the said Act of the Arkansas Secession Convention of 1861 concerning Scott and Sebastian Counties is not void as an act against the United States of America. We therefore consider the Act as valid in that respect.

Appellee claims that the effect of the ordinance of June 1, 1861, was to make the top of the Poteau Mountain

[19] See page 70 of the Ordinance of the State Convention of 1861.
[20] 171 U.S. 388, 43 Law Ed. 208, 18 S. Ct. 890.

Range the dividing line between the two counties. Appellant claims that the quoted language in the said ordinance is too indefinite to be valid. In *Crawford* v. *Brown*[21] and in *Crow* v. *Roane*[22] we had cases in which the Legislature had made a river to be the common boundary line between two counties; and we held in each case that the language was sufficiently definite to constitute a boundary line. Here, the territory going to Scott County is described as "lying south of the Poteau Mountain"; and because of the facts now to be discussed, we hold this to be a definite description.

The evidence in this case shows that the Poteau Mountain has only one range that enters Arkansas from Oklahoma, and that such range extends several miles to the east, and finally crosses the north line of Township Three in Section 3, Township 3 N., Range 31 West. There are hillocks and isolated peaks to the north of the main range, but there is only one main range of the Poteau Mountain in the affected area; so the description "lying south of the Poteau Mountain," as used in the 1861 ordinance, has definite reference to the main range. In John Bassett Moore's International Law Digest, vol. I, p. 616, the rule as to boundaries is succinctly stated by that eminent jurist: "Where a boundary follows mountains or hills, the water divide constitutes the frontier." In C. C. Hyde's work on International Law, vol. I, p. 242, the rule is stated: "A range of mountains or hills may be the boundary between two states. In such case the line of demarcation follows the water shed."[23]

In the case of *Belding* v. *Hebard,* 103 Fed. 532, it was recognized that the crest of the great mountain ranges extending across the State in a southwesterly direction is the boundary line between Tennessee and North Carolina.

In the case at bar the Act (Ordinance) of 1861 separating Scott and Sebastian Counties did not say "South of the foot of the Poteau Mountain," but said "South of

[21] 74 Ark. 568, 86 S.W. 425.

[22] 86 Ark. 172, 110 S.W. 801.

[23] To the same effect, see Hall on International Law, 6th Ed., p. 123; Glenn on International Law, p. 56.

the Poteau Mountain," so we hold that this Act of 1861 is valid, and fixed the water divide of the Poteau Mountain Range as the common boundary line between Scott and Sebastian Counties in ranges 31, 32 and 33 west, since there was territory in these survey ranges (31, 32 and 33 west) that had been taken from Scott County in 1851 to form a part of Sebastian County.

III. *Subsequent Legislation.* Appellant insists that the General Assembly of Arkansas has, by legislation since 1861, repeatedly recognized the North Line of Township Three as the boundary line between Scott and Sebastian Counties. There are six such legislative enactments cited by appellant. We identify and give the caption of each:

(1) Act 213 of 1907, "An Act Organizing Certain Territory in Sebastian County into a Special School District to be Known as the West Hartford Special School District."

(2) Act 463 of 1911, "An Act to Create a Special School District at Bates, in Scott County, and to Authorize it to Borrow Money, and for Other Purposes."

(3) Act 113 of 1915, "An Act Adding Certain Territory to the Bates Special School District, and for Other Purposes."

(4) Act 346 of 1919, "An Act to Cure Alleged Defects in the Organization of the Bates Special School District and the Issuance of Bonds by the Bates and Gipson Special School District of Scott County, Arkansas, and for Other Purposes."

(5) Act 670 of 1919 (found on p. 2586 of Vol. II of the Road Acts of 1919), "An Act to Create the Poteau Valley Road Improvement District, of Scott County, Arkansas."

(6) Act 371 of 1923, "An Act Creating the Referendum Road District of Sebastian County, Arkansas."

While the title of an act is not controlling, nevertheless, as Mr. Justice EAKIN said in *Reynolds* v. *Holland,* 35 Ark. 56:

"The title of the act affords the clue to its intention."

It will be observed that each of these six acts deals with some special matter, and did not profess an intention to effect a change in the boundary line between Sebastian and Scott Counties. Any change of boundary line by any or all of these acts can be claimed only by urging that such latter act or acts by implication amended the 1861 act,[24] which had fixed the boundary between the counties. Previous statutes may be amended by implication[25] necessarily resulting from subsequent legislation; but such implied amendments are not favored.

In 59 C. J. 857, in speaking of implied amendments to statutes, this language appears:

"It has been very generally stated that amendments of statutes by implication are not favored and will not be upheld in doubtful cases. Ordinarily, the legislature's enactment of a law will not be held to have changed a statute that it did not have under consideration at the time of enacting such law; and implied amendments cannot arise merely out of supposed legislative intent in no way expressed, however necessary or proper it may seem to be. An amendment by implication can occur only where the terms of a later statute are so repugnant to an earlier statute that they cannot stand together."

In Sutherland on Statutory Construction (3rd Ed.), § 1913, the holdings are summarized in this language:

"Amendments by implication, like repeals by implication, are not favored and will not be upheld in doubtful cases. The legislature will not be held to have changed a law it did not have under consideration while enacting a later law, unless the terms of the subsequent

[24] Act (Ordinance) of June 1, 1861 may be found on p. 70 of the Ordinances of the State Convention of Arkansas of 1861.

[25] See McLeod, Comm'r., v. Commercial Natl. Bank, 206 Ark. 1086, 178 S.W. 2d 496; Little Rock v. Quindley, 61 Ark. 622, 33 S.W. 1053; Pace v. State, 189 Ark. 1104, 76 S. W. 2d 294; City of Little Rock v. Black Motor Lines, 208 Ark. 498, 186 S.W. 2d 665.

act are so inconsistent with the provisions of the prior law that they cannot stand together."[26]

There is nothing in either Act 213 of 1907, Act 463 of 1911 or Act 371 of 1923 to support Appellant's contention that any or all of these acts by implication could have been intended to effect a change of boundaries between the counties here involved.

It is true that in Act 113 of 1915, in Act 346 of 1919 and in Act 670 of 1919 there is mention of certain land sections as being "in twp. 3 N., R. 32 W. in Scott County, Arkansas." Some of the said land sections were in fact in the strip of land here in dispute, and are in Sebastian County by virtue of the Act (Ordinance) of June, 1861, *supra.* Appellant insists that the effect of each and all of these three Acts (i. e., the one of 1915 and the two of 1919, just mentioned) is to recognize these land sections as being in Scott County. We hold that it was not the purpose of any of these said Acts to change the county boundaries, but to change boundaries of special districts. The land sections were definitely described without reference to any county. In *Rogers* v. *Magnolia Oil and Gas Co.*[27] we held that a description was sufficiently definite which made no reference to any county, but described the lands by section, township and range in accordance with the public survey. So in the Acts here in question, the description of the lands by section, township and range shows the location of the lands, and the mention of the county is surplusage.

Applying the rule against implied amendments, as previously stated, we hold that it was not the purpose of the Legislature, in enacting any or all of these six special Acts, to change the boundary between Scott and Sebastian Counties, as fixed by the Act of 1861. The very nature of these special Acts forbids a holding that the Legislature intended to amend the prior law of 1861

[26] For recent cases following the above, see Hogg v. Caudill, 254 Ky. 409, 71 S.W. 2d 1020; Genereaux v. Petit (Wash.), 19 Pac. 2d 911; Belknap v. Schock (West Va.), 24 S.W. 2d 457; and Harding v. Mutual Benefit Assn., (Idaho), 39 Pac. 2d 306.

[27] 156 Ark. 103, 245 S.W. 802.

fixing the boundaries between Scott and Sebastian Counties.

IV. *Appellant's Contention that the Claimed Boundary was Established by Recognition and Acquiescence.* Finally, appellant insists that Sebastian and Scott Counties and the citizens of each, as well as the public generally, have all the time recognized this disputed territory as being in Scott County; and that such recognition and acquiescence should control in this case. But we hold that this argument is based on a theory of limitations against the Sovereign, which theory has never been recognized in this State. In *Bittle* v. *Stuart,* 34 Ark. 224, Mr. Justice EAKIN said:

"Where no constitutional inhibitions exist, the counties are under the control of the sovereign power, which may, at pleasure, alter their boundaries, change their names, burden them with obligations, or even, it is said, abolish any particular one or more; furnishing, however, another county organization for all parts of the territory."

Likewise, in *Reynolds* v. *Holland,* 35 Ark. 56, the same eminent jurist said: "The power to change county lines is inherent in the legislature, subject to express constitutional restrictions, and the essential requisites of the state which are implied in our frame of government. See case of *Eagle, et al.* v. *Beard,* 33 Ark. 497."

The fact that the Legislature alone has the power to change county boundaries was clearly held by this Court in the case of *Cox* v. *State,* 68 Ark. 462, 60 S. W. 27,[28] in which case there arose a question as to the boundary line between Lafayette and Miller Counties. A witness testified that the south bank of Red River was "considered the boundary line" between the counties. This Court held that the boundary line was fixed by the Act of the Legislature—it was the center of the river—and could not be altered by public understanding.

[28] Even though the holding as to venue in that case was changed in the subsequent case of Bottom v. State, 155 Ark. 113, 244 S.W. 334, so that the crime could be prosecuted in either county, nevertheless, the statement of the Court, as to the Legislature having sole authority to change boundary lines, remains unchallenged.

To support his argument on this point of recognition and acquiescence, appellant cites a line of cases, such as *Puget Sound National Bank* v. *Fisher* (Wash.), 100 Pac. 724, and *Russell* v. *Robinson* (Ala.) 44 So. 1040, in each of which cases the actual county boundaries were indefinitely delineated in the legislative acts, and the Court allowed evidence of acquiescence in order to clarify the uncertainty in the land survey. But even these cases cited by appellant recognize that the sole power to fix county boundaries is in the Legislature, subject only to constitutional restraint. In *Russell* v. *Robinson, supra,* the Supreme Court of Alabama said:

"Counties are political subdivisions of the state, created for public convenience in the administration of government. Their territorial limits are fixed by the Legislature, and outside of constitutional provisions whatever of jurisdiction and powers they possess are derived from the same source. They have no power or authority to alter or change their territorial limits or boundary lines. This is a right reserved to the Legislature of the State, and to be exercised in the way prescribed in the Constitution."

In the latter case of *Elmore County* v. *Tallapoosa County,* 131 So. 552, the Supreme Court of Alabama said:

"If a boundary line of a county can be determined as a question of law, acquiescence in another line by contiguous counties is immaterial. Acquiescence can be considered only where there is uncertainty because of a conflict in the calls, descriptions, or monuments employed in the act fixing the line; . . ."[29]

In the case at bar the legislative Act of 1861 fixed the dividing line of the Poteau Mountain range in Townships 31, 32 and 33 as the common boundary line between Scott and Sebastian Counties. Such was a *definite* legislative determination, and no amount of recognition or acquiescence can change that boundary line as fixed by the Legislature.

[29] See 20 C. J. S. 773 where may be found other cases expressing the same views.

Conclusion: The decree of the Chancery Court is correct in all respects, and is accordingly affirmed.

MILLWEE, J., dissents.

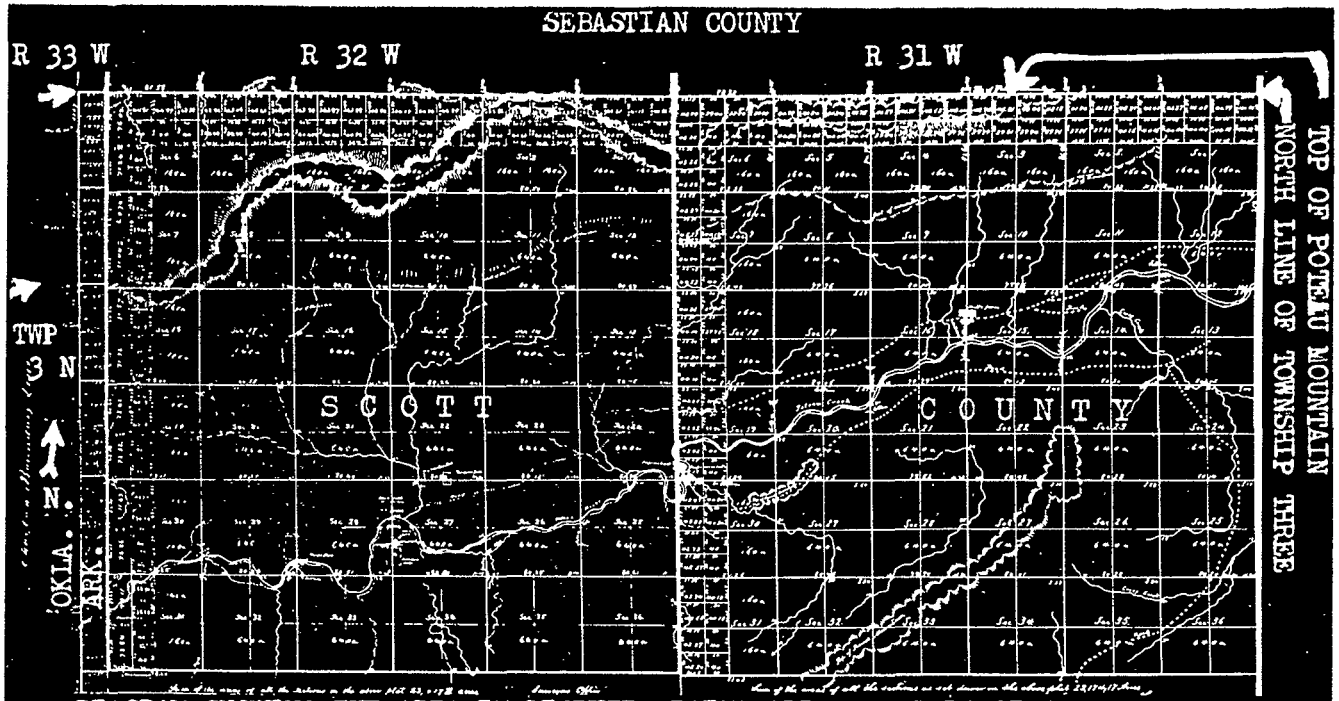

DIAGRAM SHOWING THE AREA IN DISPUTE, BEING ALL THAT PART OF RANGES 31, 32 AND 33 LYING NORTH OF POTEAU MOUNTAIN AND SOUTH OF THE NORTH LINE OF TOWNSHIP THREE.

4-8938 222 S. W. 2d 59

Opinion delivered July 4, 1949.

[redacted]

Warner & Warner, for appellant.

Carl Langston and *Lee Miles,* for appellee.

MINOR W. MILLWEE, Justice. This appeal involves venue of a suit in the nature of a bill of interpleader filed by appellants, Roy A. Drum and William K. Ward, trustee, against appellees, Charles E. McDaniel, M. B. Morgan and Ava Morgan, in the Pulaski Chancery Court.

The pleadings and exhibits reflect that the Morgans owned and operated the M. B. Morgan Ice Co. at Clarksville, Johnson county, Arkansas, on July 24, 1948, when they entered into a written contract with appellant, R. A. Drum, or his nominee, for sale of the business which included a lease contract held by the Morgans on the land and improvements thereon and certain personal property used in the business. The contract provided for a sale price of $27,500 with $22,500 payable upon the buyer's approval of title and execution by the seller of an assignment of said lease and a bill of sale covering the personal property. The contract further provided that the balance of the purchase price of $5,000 should be held by appellants until October 1, 1948, when it should be paid to the Morgans unless lien claims were then pending against the property in which event appellants should continue to hold said sum until all such claims were settled, or otherwise disposed of.

Pursuant to the provisions of the contract, the lease on the real property was assigned to appellant Ward, trustee, on July 28, 1948, and on the same date the Morgans by bill of sale delivered to Ward all the personal property described in the contract, and all of the purchase price was paid except the $5,000 which was withheld for the purpose above mentioned.

On September 21, 1948, appellee, Charles E. McDaniel, a Clarksville building contractor, filed a mechanic's lien in the office of the circuit clerk of Johnson county in the sum of $4,026.92 for labor and materials used in the construction of the building housing the ice business. The complaint further alleges: "Plaintiffs further state that the said defendants, M. B. Morgan and Ava Morgan, dispute and deny the validity and legality of said lien claim and the indebtedness asserted against them by the said defendant, McDaniel, and have demanded that plaintiffs forthwith pay the balance of said purchase price, amounting to the sum of $5,000, as aforesaid, and are threatening to institute legal proceedings against plaintiffs for recovery thereof. Plaintiffs state that the said McDaniel has not commenced suit to fore-

close his alleged lien and that they are unable to determine the validity and legality of the said disputed claims; that while they are indebted to the said defendants, M. B. Morgan and Ava Morgan for the said sum of $5,000, as balance of the purchase price of said property, they cannot pay the same voluntarily without being subject to litigation, costs and expenses and to risk and liability of having said lien claim adjudged to be a valid, subsisting and legal lien against said described property, and they cannot safely refuse to pay the same as demanded, without risk, liability and judgment against them if the said asserted mechanic's lien claim is in fact and law invalid, illegal or unenforceable.

"The said defendants are adverse claimants to the said sum of money or said property, and plaintiffs are entitled by this bill of interpleader to deposit said sum of $5,000 in the registry of this Court, to be disbursed to the lawful owners by order of this court, and when this is done an order should be entered herein releasing and discharging the plaintiffs, and their said property, of all liability to said defendants, and that the said McDaniels should be permanently enjoined and restrained from commencing and prosecuting suit on said lien claim in the court or courts of Johnson county to foreclose said lien."

Appellants prayed in their complaint that they be directed to deposit the $5,000 into the registry of the court and thereupon released from all liability to appellees and that appellee McDaniel be permanently enjoined from asserting a lien on the property or prosecuting suit in the courts of Johnson county for foreclosure of his lien or otherwise subjecting said property to payment of his lien claim. Summons was served on the Morgans in Pulaski county where they resided on October 25, 1948, and on McDaniel in Johnson county on November 5, 1948.

On November 26, 1948, appellee McDaniel filed separate motion to dismiss as to him on the ground of improper venue asserting that the complaint shows on its face that venue of the action is in Johnson county. On

December 1, 1948, appellees Morgan filed their separate answer and cross-complaint in which they admitted generally the allegations of the complaint and adopted same as their own pleading, but specifically denied the validity of the lien claim filed by McDaniel and asserted that he had been paid in full for construction of the building. They asked for judgment against appellants for the $5,000 balance of the purchase money and prayed that a lien be declared for this amount on any funds deposited in court by appellants.

On March 15, 1949, the trial court sustained the motion of appellee McDaniel to dismiss for improper venue and denied the prayer of appellees Morgan for judgment against appellants. Appellants have appealed from the action of the court in dismissing the suit as to McDaniel and appellees Morgan have cross-appealed from that part of the decree denying judgment in their favor against appellants.

Appellants insist that venue of the suit was properly laid in Pulaski county under Ark. Stats. (1947), § 27-816 (§ 1 of Act 141 of 1943) which provides: "Where there are two or more adverse claimants to money or property, the person, firm or corporation or association having custody thereof may file a bill of interpleader in the chancery court of any county in which one of the claimants resides or may be served with summons and upon depositing the money or property in the registry of the court, the court shall enter an order releasing and discharging the plaintiff from all liability; and the plaintiff shall recover all of his or its costs and a reasonable attorney's fee to be fixed by the court and taxed as costs in such suit."

Appellants say this statute superseded any former venue statute applying to an interpleader suit and, therefore, authorized the instant proceeding to be brought in Pulaski county where the Morgans reside.

Ark. Stats. (1947), § 51-615, provides that all liens created by virtue of the Mechanics' and Materialmen's Lien Act shall be enforced in the circuit court of the

county wherein the property on which the lien is attached is situated. This court has repeatedly held that chancery court has jurisdiction to foreclose such liens. *Kizer Lumber Co.* v. *Mosely,* 56 Ark. 516, 20 S. W. 409; *Martin* v. *Blytheville Water Co.,* 115 Ark. 230, 170 S. W. 1019. A leasehold interest or estate is made subject to a mechanic's lien by § 51-606 of the statute.

The first and third sub-divisions of Ark. Stats. (1947), § 27-601, provide that suits "for the recovery of real property" or "for the sale of real property under a mortgage, lien or other encumbrance or charge" must be brought in the county where the subject of the action or some part thereof is situated. In *Harris* v. *Smith,* 133 Ark. 250, 202 S. W. 244, the court said in reference to this statute: "It seems to be well settled that if the purpose of the bill and the effect of the decree are to reach and operate upon the land itself, then it is regarded as a proceeding *in rem,* and, under the statute in question, is a local action and must be brought in the county where the land is situated. *Jones, McDowell & Co.* v. *Fletcher,* 42 Ark. 422; *McLaughlin* v. *McCrory,* 55 Ark. 442, 18 S. W. 762, 29 Am. St. Rep. 56."

In *Jones* v. *Fletcher, supra,* the court in discussing § 27-601, *supra,* said: "It is very clear that the Legislature intended, in the adoption of § 4532, Gantt's Digest, as a part of our *code procedure,* to make all actions, whether at law or in equity, where the judgment or decree is to operate directly upon the estate or title, local, and to restrict the remedy to the proper tribunal of the county where the subject of the action, or some part of it, is situated. All such actions, whether by name foreclosure, partition, ejectment, or without any special designation as to title, whether expressly mentioned in the statute or not, are local, within the meaning of this section. The courts will look to the effect of such judgments and decrees, and endeavor to give full force to the statute, and carry out the defined policy of the legislative department in limiting the remedy to the proper courts of the county where the land lies." See, also, *Dowdle* v. *Byrd, Guardian,* 201 Ark. 775, 147 S. W. 2d 343.

In *White* v. *Millbourne,* 31 Ark. 486, the court held that a justice of the peace court was without jurisdiction in an action to enforce a mechanic's lien because it involved an interest in, or lien on, land. The same conclusion was reached in *Cotton* v. *Penzel,* 44 Ark. 484. In *Clark* v. *Dennis,* 172 Ark. 1096, 291 S. W. 807, it was held that a suit to impose a lien on an oil and gas lease is a local, and not a transitory, cause of action and is properly brought where the land is located under the provisions of § 27-601, *supra.*

We have also held that a general statute does not apply where there is a specific statute covering a particular subject-matter, irrespective of the dates of their passage. *Lawyer* v. *Carpenter,* 80 Ark. 411, 97 S. W. 662; *Abbott* v. *Butler,* 211 Ark. 681, 201 S. W. 2d 1001.

In the recent case of *Moncus* v. *Raines,* 210 Ark. 30, 194 S. W. 2d 1, we approved the rule stated in 50 Am. Jur., p. 542, as follows: "Repeals by implication are not favored, and there are many instances in which particular statutes are held not to be repealed by implication. As a general rule, the legislature, when it intends to repeal a statute, may be expected to do so in express terms or by the use of words which are equivalent to an express repeal, and an intent to repeal by implication, to be effective, must appear clearly, manifestly, and with cogent force. The implication of a repeal, in order to be operative must be necessary, or necessarily follow from the language used. * * * The courts will not hold to a repeal if they can find reasonable ground to hold the contrary. * * *."

It is noted that § 27-816, *supra,* is general in its application to interpleader suits while § 51-615 applies specifically to enforcement of mechanics' liens. One of the objects of the instant suit is to force appellee McDaniel to litigate his claim and assert his right to a lien in the Pulaski Chancery Court when the courts of Johnson county alone have jurisdiction of the subject-matter of such an action. It should be further observed that appellants are more than mere innocent stakeholders. They took title to the property involved with full knowl-

edge of the possibility of its being subjected to lien claims and made provision for this eventuality in their contract of purchase. They have a vital interest in the subject-matter of the litigation in that they have succeeded to the rights of the Morgans in property which may be charged with a lien for labor and materials. We conclude that § 27-816, *supra,* did not supersede or repeal by implication § 51-615, *supra,* and that appellee McDaniel has the right to litigate his claim and seek enforcement of his lien in the courts of Johnson county which have exclusive jurisdiction of the subject-matter insofar as his rights are concerned.

Appellants also contend that the provisions of § 27-816, *supra,* were held applicable prior to adoption of the statute in *Chi. R. I. & P. R. Co.* v. *Moore,* 92 Ark. 446, 123 S. W. 233, and that this decision is controlling here. There appellee brought suit in St. Francis county against the railway company and others to recover judgment for work done in building the railroad. While this suit was pending the railway company filed an interpleader suit in Pulaski Chancery Court against appellee and other labor claimants asking that the defendants be restrained from further prosecution of the St. Francis county suit. In holding that the Pulaski Court had jurisdiction of the interpleader suit, the court was careful to point out that no liens were involved, saying: "It is shown by the allegations contained in the bill that there could be no statutory lien, inasmuch as the contract under which the work was done was let by the railway company prior to the passage of the lien act of 1899." The court also recognized the convenience of conducting litigation as a controlling factor in determining the proper forum and said: "We know of no rule of law or practice that would compel the plaintiff in a bill of interpleader to seek the one forum rather than the other, both having concurrent jurisdiction. It must be assumed, in the absence of evidence to the contrary, that the party bringing his bill of interpleader under such circumstances will select the forum most convenient for the conduct of the litigation."

In the Moore case, *supra,* the labor claimants could have pursued their claims against the railway company in either St. Francis or Pulaski counties while in the instant case McDaniel's suit to enforce his lien is localized in Johnson county. It is also clear from the pleadings in the case at bar that appellants have not selected "the forum most convenient for the conduct of the litigation." Although appellants are residents of Sebastian county, they now own and operate the ice company in Johnson county where the property and court records are located and the lien claimant resides. Litigation of a claim for labor and materials would also doubtless involve the testimony of witnesses residing in that county. The effect of requiring laborers and materialmen to litigate their claims in counties other than the situs of the property might in many cases deprive said claimants of the right of compensation which the statute (§ 51-615) was designed to protect.

The trial court also correctly denied judgment in favor of appellees, M. B. Morgan and Ava Morgan, on their cross-complaint against appellants for $5,000. The contract of purchase provides that appellants shall continue to hold the $5,000 balance of the purchase price until all pending lien claims "have been settled and dismissed or otherwise disposed of." Appellants are, therefore, not required to pay over the $5,000 until the lien claims are discharged.

The decree is affirmed on both direct and cross-appeal.

MUTUAL LIFE INSURANCE COMPANY OF NEW YORK *v.* STURDIVANT.

4-8928 222 S. W. 2d 812

Opinion delivered July 4, 1949.

Rehearing denied October 3, 1949.

Chas. I. Evans, Louis W. Dawson and *Moore, Burrow, Chowning & Mitchell,* for appellant.

Chas. X. Williams and *Leffel Gentry,* for appellee.

George Rose Smith, J. In the trial court the appellee recovered judgment in her action upon a $5,000 life insurance policy issued to her husband. Appellant defended on the ground that the insured committed suicide, a risk not covered by the policy. It is now urged that the jury's verdict is not supported by substantial evidence.

The plaintiff rested her case after proving that the policy was issued on November 13, 1947, and that the insured died about a month later, on December 11. No effort was made by the appellee to show how her husband met his death. The insurer's proof was so detailed that we have a substantially complete narrative of the events leading up to Sturdivant's death.

The insured was employed by a monument dealer in Fort Smith. He was trebly obligated to his employer, in that he was short in his accounts, had drawn part of his salary in advance, and had obtained his employer's endorsement upon a note which the latter had to pay after his employee's death. Sturdivant was indebted to several other people as well. Among his debts was a $1,300 note to a Booneville bank, the loan having been procured by Sturdivant's false representation that he owned a car which was mortgaged as security. He had opened a small bank account and written a number of worthless checks, some of which did not reach the bank until after

his death. Within the last few weeks of his life Sturdivant made several unsuccessful attempts to borrow additional funds.

The insured's health was impaired. He was subject to severe sinus headaches, for which his physician had prescribed a narcotic. The patient had also suffered hemorrhages of the lungs, suggesting the possibility of tuberculosis. A week before December 13 Sturdivant made an appointment for a chest x-ray on that date, but he did not live to keep the appointment.

Financial difficulties and bad health doubtless caused the periods of despondency that are reflected by the testimony. Sturdivant's mother, called as a witness by the insurer, testified that her son, a man of thirty-four, cried several times and read the Bible frequently during the last two weeks of his life. He told his mother that he was going to kill himself, and as a result his gun was taken from him as a precautionary measure. Sturdivant's brother corroborated the existence of these crying spells and despondency.

On the afternoon preceding his death Sturdivant bought a pistol, saying that there were prowlers in the vicinity of his home. He gave a bad check in payment for the gun. While in his brother-in-law's company he started to load the pistol and wept when he was forbidden to do so. At about dusk the insured drove his employer's truck to a filling station and bought gasoline. He showed the pistol to the attendant, an acquaintance, and said, "You may not see me any more, so remember how I looked the last time you saw me." This occurred in Paris, Arkansas, where the insured had lived until March of 1947.

In the early evening a Paris policeman saw Sturdivant driving the truck around the town square. About eight minutes later this officer, accompanied by a State trooper, was driving on the highway outside of town and noticed the truck on the side of the road. Sturdivant was found in a dying condition, slumped over the steering wheel. He had been shot just above the right ear, the

ball passing through his head and emerging slightly higher above his left ear. The bullet was embedded in the side of the cab, to the left of the driver's seat and from three to ten inches above the level where Sturdivant's head would normally have been. On the floor of the truck, a few inches from Sturdivant's right hand, lay the pistol, fully loaded except that one shell had been fired. There were powder burns, made at close range, on the insured's head around the wound and on both his hands. The officers investigated the possibility of a third person's having been on the scene but found no indication of any one else's presence.

In cases of this kind we have held that a verdict must be directed for the insurer if the evidence pointing to suicide is so conclusive that fair-minded men can reach no other conclusion. *Fidelity Mut. Life Ins. Co.* v. *Wilson,* 175 Ark. 1094, 2 S. W. 2d 80; *New York Life Ins. Co.* v. *Watters,* 154 Ark. 569, 243 S. W. 831. Here the only suggestion of accidental death is based on testimony that the insured's pistol was of a type that could have discharged if it were dropped and if the hammer struck the steering wheel or floor. But even if the jury were permitted to disregard arbitrarily the undisputed evidence of Sturdivant's financial straits, his bad health and expressed intention to take his own life, there is still no tenable hypothesis by which the physical facts can be reconciled with the notion of accidental death. If the insured held the pistol to his head with both hands and pulled the trigger, the position of the powder burns and the nearly horizontal trajectory of the bullet are readily explained. Appellee suggests that the same results might follow if the pistol had been dropped accidentally against the steering wheel. A manifest flaw in this theory is that if Sturdivant had been attempting to catch the falling weapon with both hands, his head would not have been so turned that the ball could have entered above his right ear and have followed the path it actually took. To reach such a position the insured would have had to lean forward and look upward over his left shoulder in the instant of grasping for an object that could have been falling for only a small fraction of a second. We can

only conclude that the verdict was based upon sympathy for the appellee rather than upon the evidence submitted to the jury.

Reversed and dismissed.

WILDE *v.* WILDE.

4-8940 222 S. W. 2d 814

Opinion delivered July 4, 1949.

Herman Spears, for appellant.

Davis & Davis, for appellee.

GRIFFIN SMITH, Chief Justice. A decree of divorce was granted Norbert J. Wilde in January of this year on the ground that his wife had wilfully deserted him. The determining question is whether the Arkansas Court had jurisdiction, Mrs. Wilde's contention being that the plaintiff was not a resident of West Memphis. In this respect we agree with the appellant.

Appellee, who in 1944 was a dentist, married appellant in Chicago in December, 1942. The couple lived together until September, 1944, and in October Dr. Wilde enlisted in the armed forces. He was sent overseas in 1945, returning in 1946. Letters written by him during the period of separation mentioned incompatibility. There was the suggestion of divorce. Upon his return to the United States, appellee joined his wife in Chicago,

and shortly thereafter received his discharge from the navy. He had concluded to study medicine, with the expectation of specializing in surgery. With this in view he went to Buffalo, N. Y., in July. Between May and July appellant and appellee occupied the same room, but according to the testimony of each they did not cohabit in the true matrimonial sense, the more intimate relationship having been discontinued in February or March, 1944. In September, 1946, appellee resigned his position in a Buffalo Hospital and went to Memphis, Tenn., where he entered a hospital to procure further training, at a salary of $275 per month.

March 11, 1947, Dr. Wilde, alleging his residence to be West Memphis, sued for divorce. The complaint was dismissed October 20th with a finding that the plaintiff's charges of indignities and desertion were not corroborated. In March, 1948, the suit resulting in this appeal was filed. In response to a motion to make the complaint more definite and certain, appellee asserted that separation without cohabitation had continued for more than three years. The final decree found that the plaintiff was entitled to a divorce on the ground of desertion.

The 1948 complaint alleged that "no children were born to this union, and there are no common property rights to be adjusted." Testimony revealed there was a young son. The mother's right to the child's custody was not questioned by appellee, and the child is not mentioned in the decree. Mrs. Wilde testified that, although during their separation her husband had not sent money for support of the boy, nor assisted her in any manner, yet in spite of his "generally belligerent, hostile, and arrogant attitude," she had never ceased to love him, and would gladly live with him if he would provide a home. The divorce was being contested "because I believe in the permanency of marriage, [and] I think perhaps sometime something will happen, [and] that we will be able to get back together."

Dr. Wilde laid upon his wife the entire blame for separation, contending that she was indifferent, non-

responsive, and had refused to go with him when his professional status required a change in abode. He undertook to have Mrs. Wilde join him in the purchase of a home in Memphis, but she found fault with the suggestion.

While relations of the parties have no controlling part in the determination of the appeal, they are mentioned to better understand the reasons given by Dr. Wilde for going to Memphis.

Dr. Wilde explained that he regarded West Memphis as a "coming" city—a place suitable for beginning his career as a surgeon. Bonds had been voted for a hospital, and in other respects the outlook was inviting. The Doctor paid a poll tax in Crittenden County for 1947. He procured a 1947 automobile license and renewed it in 1948. In December, 1946, he applied for permission to take the Arkansas medical examination, but was not permitted to do so because he had not been examined in the basic sciences. He took this examination in June, 1947, then renewed his application for a medical examination, but did not pursue the request. His assertion that for more than sixty days before filing the second suit, and for more than ninety days preceding the decree, he had been a resident of West Memphis, is based upon proof that in December, 1946, he rented a room at the home of Mrs. J. B. Bryant, who testified that the Doctor began living there in January of the following year. He spent "on an average" three or four nights a week in the quarters so procured. Counsel for appellant, in an effort to show that this conduct was colorable, procured from Mrs. Bryant on cross-examination an admission that Dr. Wilde did not have a trunk or suit case, and that his personal belongings consisted of clothing, such as coats, shoes, some shirts, and socks. He did have what would be called "a little weekend bag— . . . he just brought his suits there on coat hangers; and his shirts in a suit case, but carried the suit case away, and they are all in my closet and dresser drawers. He left in June, 1948, taking some of his personal belongings with him, but leaving three suits, some shoes, and some underwear."

Appellant, in her answer of June 21, 1948, asserted that the plaintiff had left Memphis, Tenn., and had gone to California. The allegation that Dr. Wilde went to California was not denied, but when the case was orally argued it was insisted that the trip was in furtherance of his professional status, and that his stay was temporary.

There was testimony that the Kennedy Hospital in Memphis, where Dr. Wilde was an intern, provided living quarters for unmarried staff employes. A witness for appellee testified that Dr. Wilde did not maintain a room at the Hospital, but slept there "two, three, or four nights a week." His duties made this necessary. This same witness testified that he did not know how often Dr. Wilde slept in the Hospital,—"but at least he has to be on duty there once in a while, and my opinion is he lives at the Hospital and in West Memphis. I don't know of any other place he could live."

Our view is that appellee failed to meet the burden of proving an intent to make Arkansas his home and to emphasize this intent with convincing manifestations. It is significant that nearly six months before the decree was granted the Doctor had gone to California. This fact of itself is not sufficient to show abandonment of a fixed abode, but when considered with the impermanent nature of his arrangements in West Memphis, and other transactions, the factual fabric preponderates in favor of appellant's contention that Dr. Wilde was out shopping for a favorable divorce field, and that the transatory nature of his abode in West Memphis was merely a venue overture, unaccompanied by an intent to remain. See *Barth* v. *Barth,* 204 Ark. 151, 161 S. W. 2d 393, citing the Hillman case (200 Ark. 340, 138 S. W. 2d 1051); *Gilmore* v. *Gilmore,* 204 Ark. 643, 164 S. W. 2d 446; *Parseghian* v. *Parseghian,* 206 Ark. 869, 178 S. W. 2d 49; *O'Keefe* v. *O'Keefe,* 209 Ark. 837, 192 S. W. 2d 556; *Swanson* v. *Swanson,* 212 Ark. 439, 206 S. W. 2d 169; *Cassen* v. *Cassen,* 211 Ark. 582, 201 S. W. 2d 585; *Walters* v. *Walters,* 213 Ark. 497, 211 S. W. 2d 110; *Carlson* v. *Carlson,* 198 Ark. 231, 128 S. W. 2d 242. Other cases are to the same effect.

Reversed, with directions to vacate the decree.

A fee of $100 is allowed appellant's attorney.

GIEM *v.* WILLIAMS, ADMINISTRATRIX.

4-8937 222 S. W. 2d 800

Opinion delivered July 4, 1949.

Rehearing denied October 3, 1949.

Vol T. Lindsey, for appellant.

Eli Leflar, Harvey L. Joyce and *Glen Wing,* for appellee.

ED. F. MCFADDIN, Justice. This is an action instituted by appellee, as widow and administratrix, to recover damages for the death of Joe Williams.

Giem and Associates, hereinafter called appellants, obtained a contract to construct a dormitory on the campus of the University of Arkansas in Fayetteville. Appellants sublet the excavation work to Carl Tune. Joe Williams (hereinafter called deceased) went to the place of construction to apply to appellants' superintendent for work as a carpenter. While in appellants' shed on the premises, Williams was struck on the head by a large rock which had been hurled through the roof of the building as the result of blasting then being done by Tune in the excavation work. Williams died three days later as a result of his injuries; and this action ensued. Tune was originally named as a defendant, but was dismissed after he had paid appellee $4,000 in return for a "covenant not to sue."

The plaintiff (appellee) tried the case on the theory that the defendants (appellants) were liable for (a) failure to use proper care towards the deceased, as an invitee on the premises, and/or (b) failure to see that Tune, even as independent contractor, exercised proper care in the use of the explosives in excavation work. Appellants, for defense, claimed (a) that there was no negligence on their part; (b) that Tune was an independent contractor for whose acts appellants were not liable; (c) that deceased was not an invitee on the premises; (d) that the death of deceased was the result of an accident; and (4) that deceased was guilty of contributory negligence. The trial resulted in a verdict against appellants for

$8,950. From an unavailing motion for new trial, there is this appeal, presenting questions as to the law, the evidence and the amount of the verdict.

I. *Correctness of the Rulings of the Trial Court in Giving and Refusing Instructions.* We discuss the instructions at the outset in order to state the law before considering the evidence. Besides general instructions regarding form of the verdict, credibility of the witnesses, etc., the trial court gave five instructions as requested by appellee and 15 instructions as requested by appellants. Also, the trial court modified one of appellants' requested instructions by adding certain language as to whether the deceased was an implied invitee. In the light of what will be hereinafter stated as to the deceased's status, such modification was proper. We consider, then, the five instructions given on request of appellee, and presenting her theories for recovery.

Appellee's instruction number 1 gave the definition of an implied invitee and a statement of the duty that one in charge of premises owes such invitee, and stated the application of such to this case. Appellee's instruction number 2 presented to the jury for decision the question, whether appellants, by claiming that Tune was an independent contractor, could thereby escape liability for his negligence, if any, in the inherently dangerous blasting. Appellee's instruction number 3 presented to the jury for decision the question, whether the deceased had the right to rely on the assurances of safety when he went into the shed to await the termination of the blasting. Appellee's instruction number 4 presented to the jury for decision, whether the blasting—under the facts and circumstances in this case—was of such nature that the duty of appellants, as to proper care, could not be delegated. Appellee's instruction number 7 related to the elements of damage in the event the verdict should be for appellee. These instructions presented the law as to the liability, if any, of appellants.

A number of well-reasoned cases and authorities are cited in the briefs as bearing on these legal principles.

Besides our own cases,[1] there are also those from other jurisdictions,[2] as well as citations from general texts.[3] A good discussion on the particular point at issue—blasting by an independent contractor—may be found in 22 Am. Juris. 182, *et seq.* From all of the authorities, we conclude the law to be:

(a) that the status of the deceased as an implied invitee on the premises was a question for the jury in this case;

(b) that if deceased was an implied invitee, then the appellants owed him the duty to use proper care for his safety;

(c) that appellants, in having blasting done in the excavation for the dormitory, near a well-traveled street and in a populous center, could not escape liability, for failure to use proper care, through the claim that the blasting had been entrusted to an independent contractor;

(d) that if Tune (the independent contractor) failed to use proper care to prevent injury by missiles from the explosion, then such failure—under the facts herein—would be negligence imputed to appellants; and

(e) that the question of the contributory negligence of the deceased was a question for the jury under the evidence in this case, and was properly submitted.

Appellee's five instructions covered the above points. To set out *in extenso* the said instructions would unduly prolong this opinion. Appellants objected to the instructions by claiming that they were either general, long, abstract, or factually assumptive. Testing appellee's instructions against the objections made in the trial court and argued in the briefs, we find no errors committed.

[1] Stout Lbr. Co. v. Reynolds, 175 Ark. 988, 1 S.W. 2d 77; Holden v. Carmean, 178 Ark. 375, 10 S.W. 2d 865; Hammond Ranch Corp. v. Dodson, 199 Ark. 846, 136 S.W. 2d 484; Aluminum Ore Co. v. George, 208 Ark. 419, 186 S.W. 2d 656.

[2] Cary v. Morrison (8th CCA), 129 Fed. 177, 65 L. R. A. 659; Rosenberg v. Schwartz, 260 N.Y. 162, 183 N.E. 282; McConnon v. Hodgate, 282 Mass. 584, 185 N.E. 483.

[3] 45 C.J. 956 and also the annotation in 23 A.L.R. 1084, "Nondelegable Duty of Employer with Respect to Work which is Inherently or Intrinsically Dangerous."

II. *Sufficiency of the Evidence to Sustain Recovery Against Appellants.* In addition to the facts previously stated, there was evidence tending to show:

(1) that appellants had erected at the place of construction, about 160 feet from where Tune was excavating, the ordinary contractor's shed, which was a frame building about 12 feet wide and 30 feet long, and with a frame roof and roofing paper thereon;

(2) that the deceased and his fellow carpenter (Lindler), having learned that carpenters would soon be needed on the work, went to the place of construction in Lindler's car, which they parked on the street near appellants' shed;

(3) that deceased and Lindler, in proceeding towards the shed, met Nordstrom, appellants' superintendent, and were discussing with him the employment of carpenters, when Tune came up and advised Lindler: "You had better move your car; you are liable to get some glass broke, because they are going to shoot."

(4) that Lindler then drove his car a distance of 30 or 40 feet from where it had been parked, sat in the car until the blasting had been accomplished, and then returned to Nordstrom to complete the interrupted conversation;

(5) that when Lindler went to move his car Nordstrom and the deceased stepped into appellants' shed and were standing there "shoulder to shoulder" when the blasting occurred;

(6) that a rock "the size of a brick" crashed through the roof of the shed and struck the deceased on the head, causing the injuries which resulted in his death three days later;

(7) that in the excavation work Tune at that time was using three sticks of dynamite in each of four holes, the detonators of the dynamite being exploded simultaneously by an electric current;

(8) that the fact that dynamite was being used for such excavation was known to appellants and Nordstrom,

and the test holes for such use were shown on the plan furnished to Tune by appellants;

(9) that Tune used no mat or cushion (other than sand) over the holes for protection of the public against flying missiles, although he had on the location materials for constructing such mats; and

(10) that such mats should be used in blasting in populous places such as where this excavating was being done.

From what we have detailed of the evidence it is clear that the jury could have found that the deceased occupied the status of an implied invitee when he was in the shed with Nordstrom at the time of the blasting. In St. L. I. M. & S. Ry. Co. v. Wirbel, 104 Ark. 236, 149 S. W. 92, Ann. Cas. 1914C, 277, we held that one seeking employment was an implied invitee when he went on the premises of a company at the place he had been informed he could find the official who was authorized to employ him.[1] According to Lindler, the conversation with Nordstrom was interrupted by Tune's announcement of the impending blast; Lindler went to move his car, and deceased and Nordstrom went into the shed, apparently to await the blasting and Lindler's return before resuming the conversation. Nordstrom testified that the conversation was concluded when Tune advised the moving of the car; but Lindler's testimony and his conduct are to the contrary: so a jury question was made as to deceased's status as an implied invitee.

There was also a jury question as to whether the appellants' superintendent, Nordstrom, used proper care in selecting the shed as a place of safety and impliedly inviting deceased therein, when Nordstrom knew—or in the exercise of ordinary care, should have known—that Tune was not using mats or cushions over the holes in which the dynamite was to be exploded. Just because Nordstrom was personally willing to take the chance of injury by missiles from the blast does not furnish a

[1] See other cases on this point collected in West's Ark. Digest, "Negligence," § 32; see, also, discussion in 38 Am. Juris. 758, *et seq.*; see, also, Mo. Pac. R. Co. v. Ross, 211 Ark. 748, 202 S. W. 2d 365.

criterion of due care by appellants towards an implied invitee.

The evidence made a jury question on the issue of the contributory negligence of the deceased. There was also a jury question as to whether due care required Tune to use mats or cushions over the particular blasting about to be done, which was incident to the act of excavation on the campus of the University of Arkansas, very close to a well-traveled street. In short, we find the evidence sufficient to sustain the verdict.

III. *The Joint Tortfeasor Question as to the "Covenant Not to Sue", which Appellee Executed to Tune.* When the action was originally filed, Tune was made a defendant along with appellants. Just before the trial, Tune paid appellee $4,000 for a covenant not to sue, and, accordingly, was dismissed from the suit without any record objection being made by appellants. In the trial appellants introduced in evidence the covenant not to sue which appellee had executed to Tune, and showed to the jury that appellee had received $4,000 from Tune. After the verdict for appellee for $8,950, appellants moved the court to credit the verdict with the $4,000 which Tune had paid appellee in order to obtain the covenant. The motion was denied, and appellants claim error.

Act 315 of 1941 is the Uniform Contribution Among Tortfeasors Act, and may be found in §§ 34-1001, *et seq.*, Ark. Stats. of 1947. Appellants and appellee both cite the case of Shultz v. Young, 205 Ark. 33, 169 S. W. 2d 648 as applicable to the question now presented. In Lacewell v. Griffin, 214 Ark. 909, 219 S. W. 2d 227 we listed other cases which have involved phases of the Uniform Contribution Among Tortfeasors Act. Appellants had the right, under § 34-1007 Ark. Stats. of 1947, to make Tune a third-party defendant, even after the appellee had dismissed as to him. But, instead of availing themselves of the said section, appellants evidently decided to proceed under § 34-1004 Ark. Stats. of 1947, which reads:

"*Release of one tortfeasor—effect on injured person's claim.* A release by the injured person of one joint tortfeasor, whether before or after judgment, does not discharge the other tortfeasors unless the release so provides; but reduces the claim against the other tortfeasors in the amount of the consideration paid for the release, or in any amount or proportion by which the release provides that the total claim shall be reduced, if greater than the consideration paid."

At all events, as between appellants and appellee, appellants in the trial of the case before the jury obtained the full benefit of the above-quoted section by introducing into evidence, proof as to the amount of money that appellee received from Tune. Certainly, in such circumstances, appellants were not entitled to have the court—after the verdict—make the allowance again. We hold against appellants on this said contention.

Finding no error, the judgment is affirmed.

McKINNEY *v.* STATE.

4570 223 S. W. 2d 185

Opinion delivered October 3, 1949.

R. W. Tucker, for appellant.

Ike Murry, Attorney General and *Jeff Duty,* Assistant Attorney General, for appellee.

George Rose Smith, J. By information the appellant was charged with maliciously, willfully and wantonly killing five hogs and wounding three more, all owned by W. D. Elms. The jury imposed a fine and assessed the amount of damages, the court entering judgment in favor of Elms for treble damages as authorized by statute. Ark. Stats. (1947), §§ 41-403 and 41-405.

Appellant contends that his plea of former jeopardy should have been sustained. Soon after the incident appellant was arrested and his case set for trial in the municipal court. A similar charge against another man was tried first, however, and the municipal judge ruled that no offense had been committed. The prosecuting attorney then entered a nolle prosequi as to this appellant and later filed the present information in the circuit court. These facts do not establish former jeopardy, for the State's dismissal of a case before the trial has begun does not prevent a subsequent prosecution. Miller on Criminal Law, § 186.

On the merits there was conflicting testimony as to whether the killings were malicious, willful or wanton. Elms testified that the hogs had never escaped before and were at his barn on Sunday afternoon. This testimony was corroborated by Amos Webb. The animals were missed that night and were killed the next day in appellant's corn field, about two and a half miles away. Appellant's testimony was to the effect that the hogs had been in his cornfield for at least ten days, that he was unable to learn the identity of their owner, and

that he finally killed two of them in order to prevent further damage to his crop. A deputy sheriff quoted appellant as having said that he was ready to go down and shoot the rest of them if they were in his field. We think the jury were warranted in believing that the hogs escaped on Sunday and that appellant shot them on the following day without having made a sufficient effort to discover their owner or to remove them by less drastic means.

Appellant's remaining contentions were not so presented to the trial court as to enable us to consider them. The court, without objection by the appellant, instructed the jury in the language of the statute. Appellant offered an instruction based on Ark. Stats. (1947), § 78-1143, but did not save an exception to the court's refusal to give the requested charge. Finally, it is urged that the trial court proceeded upon the erroneous assumption that appellant was required to fence his cornfield against trespassing animals. To the extent that this question was involved in rulings upon the admissibility of evidence as to the condition of the fences, appellant's failure to except to the court's action precludes his raising the issue here. And if he wished to have his theory presented to the jury it was his duty to submit an instruction embodying his view of the law. *Lucius* v. *State,* 116 Ark. 260, 170 S. W. 1016. Not having done so, he cannot now question the action of the court below.

Affirmed.

ST. LOUIS-SAN FRANCISCO RAILWAY CO. *v.* STATE.

4567 223 S. W. 2d 186

Opinion delivered October 3, 1949.

E. G. Nahler and *Westbrooke & Westbrooke,* for appellant.

Bailey & Warren, Ike Murry, Attorney General, and *Robert Downie,* Assistant Attorney General, for appellee.

ED. F. MCFADDIN, Justice. Appellant was convicted of a violation of the Full Switching Crew Law of Arkansas,[1] in that the appellant's switching crew in the City of Osceola consisted of an engineer, fireman, conductor and only *two* brakemen, whereas the State contends that *three* brakemen are required by the said law, the germane portions of which read:

"No railroad company or corporation owning or operating any yards or terminals in the cities within this State, where switching, pushing or transferring of cars are made across public crossings within the city limits of the cities shall operate their switch crew or crews with less than one engineer, a fireman, a foreman and *three* helpers. It being the purpose of this Act to require all railroad companies or corporations who operate any yards or terminals within this state who do switching, pushing or transferring of cars across public crossings within the city limits of the cities to operate

[1] This is Act 67 of 1913, and is now contained in §§ 73-726, *et seq.*, of Ark. Stats. of 1947. The recent case of Kans. City So. Ry. Co. v. State, 213 Ark. 906, 214 S. W. 2d 79 involved the same law; and in the opinion in that case the earlier cases were listed and discussed.

said switch crew or crews with not less than one engineer, a fireman, a foreman and three helpers, . . ." (italics our own).

It is conceded that the only question is whether the railroad switch tracks in the City of Osceola constitute a railroad "yard", as that word appears in the said law. In claiming that the trial court erroneously decided this fact question, appellant says:

"The appellee contends that the appellant owns 'yards' in the City of Osceola. Because of its interpretation of the word 'yard' in the statute it charges the appellant has violated the statute in switching, pushing or transferring cars across public crossings in Osceola using only two helpers instead of three helpers in addition to an engineer, a fireman and a foreman. The appellant denies that it is violating the statute because Osceola is not a 'yard' or 'terminal' as those terms are understood in railroad parlance. The burden is on the State to prove its charge and the evidence is in conflict."

We agree with appellant that the evidence in this case is in conflict; but we hold that there is sufficient evidence to sustain the finding against appellant. The record discloses that the appellant has facilities in Osceola consisting of seventeen spur, team and house tracks totalling more than three miles in length; that these tracks serve eleven industries and are across four streets; that appellant maintains a switch engine and crew at Osceola for the purpose of doing switching in that city and also in Wilson, a community several miles away; that the Osceola switch engine takes cars from arriving trains to the various industries and then collects the cars containing outgoing freight, and returns them to the proper tracks for the departing trains; and that this switching and collecting of cars is done on no authorized time table, but as prescribed by signals, rules and instructions from time to time.

The evidence as thus synopsized, together with other evidence in the record, is sufficient to support the holding that appellant's facilities in Osceola constitute a

"yard", whether tested by (1) the dictionary definition, (2) that contained in the cases, or (3) the railroad's own definition as contained in some of its "rules." Webster's New International Dictionary defines a railroad yard as: "a system of tracks within prescribed limits used for making up trains, storing cars, etc., . . ." In Smith v. Boston & M. R. Co., 88 N. H. 430, 191 Atl. 833, there was presented the question of what constituted a railroad yard, and this language appears in that case:

"The term 'yard', in the construction of statutes, even in the construction of penal ones, is considered not as limited only to places so designated by the railroad, but is interpreted to include places 'upon which are railroad tracks, used for the purpose of receiving and storing cars when not in use, or used for the purpose of switching in the distribution of cars and engines to other places and in the making up of trains.' Chicago & Northwestern Railway Co. v. Chicago, 151 Ill. 348, 357, 37 N. E. 842, 844; George v. Quincy, O. & K. C. R. Co., 179 Mo. App. 283, 167 S. W. 153; Baltimore & Ohio Southwestern Railway Co. v. Little, 149 Ind. 167, 172, 173, 48 N. E. 862; Harley v. Louisville & N. R. Co. (C. C.) 57 F. 144; 51 C. J. 372."[2]

The railroad rules define a yard as:

"A system of tracks within defined limits provided for the making up of trains, storing of cars, and other purposes, over which movements not authorized by timetable or train order may be made, subject to the prescribed signals and rules or special instructions."

Under either of the foregoing definitions, the evidence is sufficient to support the factual finding that appellant's facilities as actually used in the City of Osceola constitute a "yard" as that word is employed in the statute under consideration. Affirmed.

[2] See, also, *Order of Ry. Conductors* v. *Swan, et al.*, 329 U. S. 520, 67 S. Ct. 495, 91 L. Ed. 471 (in which appears a stipulated definition of a railroad yard); and see also the words "railroad yard" in Words and Phrases, Vol. 36, p. 73 and "yard" in Words and Phrases, Vol. 45, p. 639.

[redacted]

MISSOURI PACIFIC RAILROAD COMPANY, THOMPSON, TRUSTEE *v.* LAWRENCE.

4-8930 223 S. W. 2d 823

Opinion delivered October 3, 1949.

Rehearing denied November 14, 1949.

[redacted]

Henry Donham and *William J. Smith,* for appellant.

J. H. Lookadoo and *H. B. Stubblefield,* for appellee.

FRANK G. SMITH, J. Appellee recovered judgment for $25,000 to compensate an injury which he sustained in a collision between one of the passenger trains of appellant railroad company and a taxicab he was driving in the City of Little Rock.

A motion was filed to dismiss the case upon the ground that the Clark County Circuit Court, where the suit was brought and tried, was without jurisdiction thereof, inasmuch as appellee was not a resident of that county and the injury occurred in another. The motion

was overruled and the trial resulted in the judgment which this appeal seeks to reverse.

The venue of this and similar litigation is controlled by Act 314 of the Acts of 1939, which provides that all actions for damages for personal injury or death by wrongful act shall be brought in the county where the accident occurred which caused the injury or death, or in the county where the person injured or killed *resided at the time of the injury.*

The answer to the question of venue posed depends upon the answer to these two questions. (1) Is residence synonymous with domicile? (2) If not, was appellee a resident of Pulaski county at the time of his injury? If the words "Residence" and "Domicile" are synonymous, then the Clark County circuit court had jurisdiction, as we think the testimony was sufficient to support a finding that appellee's domicile was in Clark County at the time of his injury.

In our opinion the words are not synonymous and cannot properly be used interchangeably. Cases without number have pointed out the difference in meaning which the words import, and our own early case of Krone v. Cooper, 43 Ark. 547, is one of these. A headnote in that case reads as follows: "'Domicile is of broader meaning than residence.' It includes residence: but actual residence is not indispensable to retain a domicile after it is once acquired. It is retained by the mere intention not to change it." In the body of that opinion Chief Justice Cockrill said: "The appellant's testimony, taken alone, would establish, not only an actual residence, but a domicile in this state. His honor, the circuit Judge, who determined the facts upon the testimony, might well have concluded, as he doubtless did, that appellant's acts and previous statements about his domicile, contradicted his testimony in that behalf. Admitting, however, that the testimony clearly shows that appellant's domicile was in St. Louis, we find nothing sufficient to show that his actual residence was not in Arkansas. The burden of showing this was upon the appellees. It was not shown that appellant's regular

place of abode, his dwelling place, was in St. Louis. If it had been, the bare fact that he spent a great part of his time in Arkansas attending to business interests there, would not have been a sufficient answer."

We cannot assume that the General Assembly was unaware of this difference in the meaning of the two words, but on the contrary, we must assume that it was aware of the fact that a person might have a residence in one place and his domicile in another. The venue act does not provide that the plaintiff may sue in the county of his domicile, but provides that if the suit is not brought in the county where he was injured it must be brought in the county where he "resided at the time of injury." The question is not in what county did appellee reside for the longest period of time, but at the time he was injured. In our opinion the undisputed testimony admits of no other reasonable construction than that appellee was a resident of Pulaski County at the time of his injury. The following testimony was offered by appellee, or his wife, or her mother, and was undisputed by them or any one of them.

Appellee was born in Clark County, and enlisted as a soldier in World War II as a resident of that county, and upon receiving an honorable medical discharge from the army, returned to that county and registered his discharge there. His wife was also a native of Clark County and for some time after their marriage they resided in Gurdon, Clark County, and kept house there. Their only child was born in that county and both testified that that county was their home and that it was their present intention, and had always been, to return to that county.

Appellee has had a very peripatetic career which he detailed as follows. He entered the army in 1941 and was discharged Nov. 3, 1943, and after his discharge he worked in Gurdon until April, 1944, when he came to Little Rock and secured employment from the Missouri Pacific Railroad Co. in which employment he continued for a period not disclosed by the record. He returned to Gurdon, for two weeks or longer, after which he was

employed by Swift & Co. in Little Rock for some two to five months. He quit that job and went to the State of Indiana, where he remained a month and then returned to Gurdon. He was again unable to secure employment there at a satisfactory wage, and he returned to Little Rock where he secured employment from the Terminal Van & Storage Company, in which he continued from July to January 1, 1946. He quit that employment and went to Arkadelphia where his wife's father and mother lived, and after a short visit there went to Gurdon. But this too was a mere visit as he had no home in Gurdon at that time. He went to Texas and while there obtained a driver's license to operate a truck and gave as his place of residence the city in which he was employed. He testified that it was his practice always to give as his place of residence the place of his employment.

He soon left Texas and returned to Little Rock where he was given employment by the Olmstead Mfg. Co., which he soon quit and went to St. Louis where he remained from July to October, 1946. He returned to Little Rock and went to work for Swift & Co. in Little Rock for three or four weeks, where he continued to work until November 21st or 22nd, when he was employed by the Yellow Cab Co. of Little Rock, in which service he was engaged when he received the injury to compensate which this suit was brought.

Appellee left Gurdon in 1944 and has not resided there since. He testified that when he left Gurdon he stored his household effects in a house which his mother had rented, which was not rented as a residence, but for storage purposes only. He visited Gurdon frequently since leaving there, but his trips were mere visits as he had no home there. He stated that the purpose of these trips was to see after his things and to see about his dog which he had left there. His effects which he did not take to Little Rock remained in storage until February, 1947, when they were brought to Little Rock by his father.

In his attempt to show that he did have a residence in Gurdon he was interrogated as follows:

Q. "Where do you live now in Gurdon?"

A. "I can live with my aunt and uncle."

Q. "You can live with your aunt and uncle?"

A. "That's right."

Q. "You consider your home with your aunt at Gurdon?"

A. "At the present time if I would go there it would be."

This is the nearest approach to showing that appellee had a home in Gurdon and that testimony shows only that there was a home to which he might have gone, but did not go.

Appellee testified that before seeking employment with the taxicab Co. he went to Gurdon to secure assistance in establishing a long distance hauling business, and had he secured that assistance Gurdon would have been his home, but he did not secure this assistance and did not establish this business and he returned again to Little Rock and entered the employment in which he was engaged when injured. There appears to be no doubt that appellee ceased to be a resident of Gurdon in 1944 although he may have retained his domicile at that place.

In his various applications for employment in Little Rock appellee gave as his place of residence a Little Rock address, first one and then another. He obtained a chauffer's license for the years 1945, 1946 and 1948 and in each application he gave a Little Rock address.

While employed from and after 1944 at intermittent periods in Little Rock his wife visited occasionally in Gurdon, but more often in Arkadelphia where she was called on account of the illness of her mother. When appellee came to Little Rock in 1944 his wife secured employment in December of that year with the Little Rock Laundry where she worked for about two years. This work was not continuous, but was interrupted by visits which she made to Arkadelphia to attend her mother. But they kept house in Little Rock, living in a

furnished apartment, or rather in several different ones. They put their child in school in Little Rock as soon as he was able to enter, and they changed to another school in that city when they changed their residence. Appellee's wife was asked, "Where was your home in 1946," and she answered, "Arkadelphia." The attorney then asked, "Arkadelphia and Gurdon?" and she answered, "Yes, Arkadelphia and Gurdon." When attending her mother she stated that her son was with her and that appellee himself was with her while she was attending her mother, but the son never attended any school except in Little Rock.

Had appellee brought this suit in Little Rock no one would have thought of questioning his right to do so as a resident of that city, apart from that being the place of his injury. At any rate that right clearly existed as appellee and his wife and child were residing in Little Rock when appellee was injured. It is true they were living in a furnished apartment, which was their place of residence, although they had household effects in storage at Gurdon where they had been stored since 1944. The injury occurred Nov. 30, 1946, and the suit was not filed until Sept. 16, 1948. The case was tried in Arkadelphia and the judgment rendered Nov. 3, 1948. During this nearly two year interval appellee continued to reside in Little Rock with his wife and child, making visits both to Gurdon and Arkadelphia. He was confined in the hospital for a week after his injury and later secured employment with the Ark. Motor Freight Lines Inc. in which employment he sustained another injury Sept. 26, 1947, for which he received compensation checks in payment thereof, all of which were sent to him at his Little Rock address.

Appellee insists that as the animus manendi, or the intention of remaining in Little Rock, was not shown, no residence was acquired in that city and in support of that contention the recent cases construing our 90 day divorce law, which was Act 71 of the Acts of 1931, p. 301, are cited. In the first opinion construing that Act the case of Squire v. Squire, 186 Ark. 511, 54 S. W. 2d 281. decided Nov. 21, 1932, it was held that under

this act, authorizing the granting of a divorce upon a residence in this state for 90 days, there was no requirement that the plaintiff seeking a divorce must have had a permanent intention of making this state his home. That opinion was followed in a number of subsequent cases, and remained the law until April 28, 1947, when it was overruled in the case of Cassen v. Cassen, 211 Ark. 582, 201 S. W. 2d 585. Under the authority of the Squire case many persons came into the state and obtained divorces here, who were in fact mere sojourners, and returned to their homes from whence they had come as soon as they had obtained the decree of divorce.

The policy of the law in granting divorces was reviewed in the Cassen case, and it was held that the doors of our courts in granting divorces should be opened only to persons who were bona fide residents of this state, not only when the decree of divorce was rendered, but also at the time when the suit was filed, and that one was not a bona fide resident of this state whose domicile was elsewhere. It was there said that "by bona fide residence, we mean the same as domicile". In other words, a domicile in this state was essential to maintain a suit for divorce. Be it so, we do not think the Cassen case is applicable here which is not a divorce case.

The case which we think does apply and is controlling here is that of Norton v. Purkins, Judge, 203 Ark. 586, 157 S. W. 2d 765, which turned upon and was controlled by Act 314 of the Acts of 1939. In that case the Cleveland Circuit Court had assumed jurisdiction of a personal injury suit when the injury had occurred in another county. Jurisdiction was defended upon the ground that the plaintiff was in fact a resident of Cleveland county where the suit was pending. It was held, under the facts there cited, that plaintiff was not a resident of Cleveland county and prohibition was granted. Hudson, the plaintiff, testified that he was born and reared in Cleveland county and that his home was in that county and that he farmed there from 1937 through 1939. He was injured January 14, 1939. It was shown however, that Hudson had secured employment in Ouachita county, where he was injured. That he had

rented a house in Ouachita county, in which he was living at the time of his injury, and that his child had been enrolled in a school in Ouachita county, although some of the household effects were in Cleveland county in a house which he had rented.

The facts stated parallel this case, except that here appellee has no home in Clark county, his household effects being stored in a house which had not been rented for residential purposes, but for storage purposes. He had rented a furnished apartment in Pulaski county, where he was living when injured, with his wife and his child who was later placed in school in Pulaski county. The opinion in the Norton case, supra, recites that: "He (the circuit judge) held as a matter of law that 'resided', as used in act 314, contemplates the place of one's permanent abode, and further held that Hudson's permanent abode and residence was Cleveland County." The opinion further states: "We cannot agree with the construction which the circuit judge placed upon the word 'resided' in act 314. We do not think that 'resided', as used in this act, necessarily means one's permanent abode or legal residence or domicile." The opinion then quoted the language used by Chief Justice Cockrill in the Krone v. Cooper case, herein above copied, thereby reaffirming what Justice Cockrill had said.

The opinion proceeds: "This court further said in the case of Smith v. Union County, 178 Ark. 540, 11 S. W. 2d 455: 'Residence, as used in § 9890, Crawford & Moses' Digest, means the place of actual abode, and not an established domicile or home to which one expects to return and to occupy at some future date.'

"In the case of Shelton v. Shelton, 180 Ark. 959, 23 S. W. 2d 629, this court, in referring to the case of Smith v. Union County, supra, and other cases, said: 'It will be seen from these cases that residence and domicile are not to be held synonymous; that a man may have a residence in one state or county, and he may be a nonresident of the state of his domicile in the sense that the place of his actual residence is not there'."

This case has not been overruled. On the contrary, it was cited with approval in the case of Twin City Coach Co. v. Stewart, 209 Ark. 310, 190 S. W. 2d 629. The opinion in the case of Twin City Coach Co. v. Stewart did not recite the facts as to residence, but did say that a petition for prohibition in that case had been overruled for the reason that a question of fact as to residence was involved and it would not be presumed that there would be an incorrect determination of that question when the case was tried. The point was reserved and was re-presented when the case was tried in the circuit court.

In the dissenting opinion by Justice McFaddin, in the Twin City Coach Co. case the following facts were recited. "Here are the facts: Miss Valeta Stewart became 18 years of age on March 7, 1944, and was killed in Fort Smith, Arkansas, on April 22, 1944. Her parents lived in Booneville, in Logan county; and she lived in the home with them until April 19, 1943, when she began working as a waitress at a cafe in Fort Smith, in Sebastian county. Miss Stewart and other girls had an apartment in Fort Smith, and paid the rent monthly. She kept her clothes in Fort Smith. She worked six days a week in the cafe and went to Booneville on her rest day 'nearly every week,' and took her soiled clothes to Booneville where she and her mother laundered them. During three weeks in early 1944 the cafe was closed for repairs; and Miss Stewart spent this time with her parents in Booneville. There is no record of any voting or payment of taxes."

There was thus a question of fact as to whether the injured party was a resident of Ft. Smith where she worked 6 days a week, or of Booneville where she rested on the seventh day and had her laundry done, and for that reason prohibition had been denied. It was thought by the dissenting Justice that the opinion in the Norton case, supra, had been weakened if not by implication overruled, which action met with his approval, as he thought too narrow a view of residence had been taken in the Norton case. However, the Norton case was not overruled, certainly not expressly, nor by implication,

as it was cited with approval in the majority opinion in the Twin City case.

In its last analysis the controlling question is whether residence and domicile are synonymous words, meaning the same thing. To hold that they are would overrule the Norton v. Purkins case, and the cases there cited, and numerous other cases to the contrary.

Norton v. Purkins has not been overruled by implication or otherwise; on the contrary, it was quoted with approval and followed in the case of Burbridge v. Redman, 211 Ark. 236, 200 S. W. 2d 492, an opinion subsequent to the Twin City case, supra.

The opinion in the Burbridge case makes it definitely clear that the Norton v. Purkins case was not overruled. We copy from the opinion in the Burbridge case the following statement: "The case affords an excellent example of the Court's determination that a plaintiff's contentions in respect of residence must be considered in connection with his conduct, from which an intent will be deduced.

"In the Norton-Purkins case Hudson had some household effects in Cleveland County, and had a temporarily rented residence; but by actions he had very definitely shown a purpose to reside elsewhere."

The opinion continues: "Another case in point is Twin City Coach Co. v. Stewart, Adm'r., 209 Ark. 310, 190 S. W. 2d 629. There was no disagreement as to the majority opinion that venue was in Logan County; but, since this opinion held that an instructed verdict for the defendant should have been given, facts connected with the decedent's actions affecting the contention that she had chosen Fort Smith as her residence were not detailed. The dissenting opinion, while expressing the majority's view that venue was in Logan County, elaborated upon evidence touching venue, and disagreed with the general result. (Shephard v. Hopson, 191 Ark. 284, 86 S. W. 2d 30.)"

Here appellee was injured in Pulaski county, which unquestionably was at the time of his injury his place

of abode, and that of his family, and Pulaski county was therefore the county in which he was residing at the time of his injury, within the meaning of Act 319. The Clark County Circuit Court was therefore without jurisdiction and the judgment must therefore be reversed and the cause dismissed without prejudice to the right to sue in Pulaski county.

LEFLAR, J., not participating.

ED. F. MCFADDIN, Justice (Dissenting). With the greatest respect for, and deference to, the writer of the majority opinion and my colleagues who voted for it, I must nevertheless dissent; because, as I see it, there are two fundamental errors in the holding of the majority: first, it reverses the finding of the trial court on a disputed fact question; and second, it reverses the holding of this court on an adjudicated law question.

I. *The Fact Question.* It has long been the rule that when the trial judge decides a fact question, either interlocutory or preliminary to the trial, such decision will be sustained on appeal if there is any substantial evidence to support it. *Blass* v. *Lee,* 55 Ark. 329, 18 S. W. 186; *Metcalf* v. *Jelks,* 177 Ark. 1023, 8 S. W. 462; *Mosley* v. *Mohawk Lbr. Co.,* 122 Ark. 227, 183 S. W. 187; *Shephard* v. *Hopson,* 191 Ark. 284, 86 S. W. 2d 30; *Halliday* v. *Fenton,* 164 Ark. 11, 260 S. W. 961; *Scroggin & Co.* v. *Merrick,* 176 Ark. 1205, 5 S. W. 2d 344; *McElroy* v. *Underwood,* 170 Ark. 794, 281 S. W. 368.

In the case at bar, as preliminary to the trial on the merits, there was presented the opposition to venue. The trial court heard evidence on the venue issue, and upon highly conflicting evidence arrived at the conclusion that Ellis Lawrence could legally place the venue in Clark County as the county of his residence (under Act 314 of 1939). In view of the sharply disputed evidence as to the place of the plaintiff's residence, and in keeping with the cases cited, the majority should have affirmed the circuit court on the fact question. Instead, the majority has selected certain facts which to it seem sufficient to show no venue in Clark County, and has ignored facts

pointing to the opposite conclusion. This is not the correct test. This court on appeal should determine if the record shows substantial evidence to support the finding of the circuit court and, if so, then the factual decision should be affirmed. It is not a question of what we would hold were we the original triers of the fact; it is, whether there are any substantial facts to support the conclusion reached by the original trier of the facts, that is, the circuit court.

In addition to the testimony of the plaintiff that he had his residence in Gurdon, Clark County, Arkansas, on November 30, 1946, there was the testimony of other witnesses to the same effect. Here is some of the evidence:

1. Mrs. Lottie Lawrence, mother of the plaintiff, testified that the family had lived in Gurdon for 27 years prior to February, 1947; that Ellis Lawrence was living in the home with his parents in Gurdon when he went to the Army; that after his military service he returned to Gurdon; that he and his family lived in the home with the witness; that plaintiff worked at various places but always returned to Gurdon; that his household goods and all of his clothes—except what he was wearing—were in Gurdon at the time the plaintiff was hurt on November 30, 1946.

2. Mrs. Emily Lawrence, wife of the plaintiff, testified:

"Q. Had you moved your stuff from Gurdon up there?

A. No, sir, nothing but clothes up there.

Q. Did you have your household goods and kitchen things up there?

A. No, sir. All our housekeeping stuff and dishes and everything was at Gurdon.

Q. Did you have any canned goods?

A. Yes, sir.

Q. Did you move any of that to Little Rock?

A. No, sir.

Q. You kept it down there?

A. Yes, sir.

Q. What had you taken up there?

A. Just our clothes.

Q. You just took the clothes you needed up there?

A. Yes, sir.

Q. You hadn't moved up there then?

A. No, sir."

3. Tom Wells, a disinterested witness, testified that he had known the plaintiff "ever since he was a kid"; that just "a week or so" before plaintiff received the injuries here involved, Wells and the plaintiff had a conversation in Gurdon about a prospective business deal. Here is Wells' testimony, *elicited by appellant on cross-examination:*

"A. I didn't know they were gone.

Q. Up until now?

A. No, a while after he got hurt.

Q. You learned it after he got hurt?

A. No, I don't believe they had moved at that time. It was some time after that he was gone.

Q. In the summer of 1946, do you know whether the family was there?

A. I am sure they were living in Gurdon at that time.

. . . . .

Q. You cannot testify he was living in Gurdon in 1946 then?

A. I can testify he was there every week or two.

Q. You cannot testify he lived there or had a home there?

A. That is what he told me.

Q. You never did consumate your plans about the freight line deal you talked about going into, did you?

A. I never did go into the details about it. The boy had always been honest with me, and I felt like it would be a good deal.

Q. You discussed the plans about a possible business venture?

A. Yes, sir.

Q. But you didn't go into the business?

A. No, sir, I heard he got hurt a week or so after that."

Without detailing all of the testimony, I submit that there was not only substantial evidence, but sufficient substantial evidence to support the holding of the trial court on the fact question of venue; and that the majority opinion does violence to our previous cases on this point.

II. *The Law Question.* The Venue Act (No. 314 of 1939) has resulted in prolific litigation, and our cases on venue are not altogether harmonious. In *Norton* v. *Purkins,* 203 Ark. 586, 157 S. W. 2d 765, we took one view of "residence." In *Twin City Coach Co.* v. *Stewart,* 209 Ark. 310, 190 S. W. 2d 629, we took—what to me, then seemed and still seems to be—an entirely different view of "residence." Now in the present case we are turning away from the Twin City Coach case and thus, undoubtedly, leaving the bench and bar considerably at a loss as to what is "residence" within the purview of the Venue Act. The facts in the case at bar bring it within the holding in the Twin City Coach case, and I submit that we should follow that case, and that the holding in the present case is at variance with it.

For the reasons herein stated, I respectfully dissent, and I am authorized to state that Mr. Justice MILLWEE joins in this dissent.

4571 223 S. W. 2d 507

Opinion delivered October 3, 1949.

Rehearing denied October 31, 1949.

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[redacted]

[redacted]

[redacted]

Vol T. Lindsey, for appellant.

Ike Murry, Attorney General, and *Arnold Adams,* Assistant Attorney General, for appellee.

GRIFFIN SMITH, Chief Justice. Lois Cooper was found dead near Gravette the evening of December 23, 1948. Proximity of an old truck near the city garbage dump where the body was found, the peculiar nature of injuries sustained, contradictory statements by Mrs. Cooper's husband, and unexplained conduct, led to Cooper's arrest on information filed January 7th. He was convicted of first degree murder and given a life sentence.

The motion for a new trial lists twenty-three alleged errors, some of which are not argued.

Matters emphasized by the appellant, upon which he relies for reversal, are listed in the first marginal note.[1]

[1] (1) The evidence was insufficient, and an instructed verdict of not guilty should have been given. (2) Gene Thrasher, a juror, stated on his *voir dire* examination that none of the State's witnesses had discussed the case with him, and that he had not formed or expressed an opinion regarding the defendant's guilt, whereas in conversation with a witness, overheard by others, he had said Cooper was guilty and ought to be convicted. (3) Improper evidence was admitted. (a) In particular it is urged that testimony given by Thelma Whitlow, a stenographer, should have been excluded, or, in the alternative, she should have been required to supply the defendant with a transcript of his examination December 29th when the coroner conducted an inquest, all witnesses at the hearing having been sworn. Miss Whitlow, in response to questions directed by the Prosecuting Attorney, read the answers Cooper had given. At that time no accusations had been made. (b) Statements made by Cooper while in an ambulance just before he was treated by Dr. Wilford Wilson were privileged as communications between physician and patient. (c) Paul Adams ought not to have been allowed to testify to the defendant's "relations" with unnamed women over a period of three years from 1937 to 1941; also, that in 1937 Cooper burned an automobile for the purpose of collecting insurance. (d) The Court should have excluded testimony by Roy Stewart regarding tests with a barrel and valve stem, the State's theory being that Mrs. Cooper's skull was fractured with the valve stem of an automobile inner tube attached to an oil drum. (e) The defendant also predicates error upon the Court's action in not permitting him (while examining W. H. Watson, who had testified for the State) to show that he (Cooper) made certain statements when he procured from Watson a long valve stem in exchange for a shorter one. (f) It was error to exclude testimony by others regarding what Cooper had said about procuring the valve stem and the use he intended to make of it. (g) The Court should have admitted testimony regarding questions asked of an insurance agent by Cooper concerning the cash value of a policy on

First—Sufficiency of the Evidence.—The first public knowledge that Cooper's truck had been wrecked came when three young men driving south from Sulphur Springs to Gravette heard calls for help a short distance from the city garbage dump. They stopped and saw Cooper prone on the roadside as though in distress. He explained that the pick-up truck he and Mrs. Cooper were using in carting trash from their home had been wrecked; that it had "gone over the bank," or something to that effect, and that Mrs. Cooper was at the bottom of the ravine dead or in a dying condition. When help arrived it was found that the truck had "nosed over" the embankment and had come to a stop at a sharp incline with the front end embedded in the debris and the rear near enough for one standing on the roadside to reach the bumper with his foot. Waste matter in and against which the car was lodged consisted of discarded tin cans, charred remnants, broken glass, wire, etc. The car differential was so close to the ground that a person could not conveniently see under, while at the front there was no space between car and debris. Mrs. Cooper's body was 130 feet down the ravine. One witness testified that she was lying on her right side, with the left foot crossed over the right one, resting on an old automobile tire. This witness observed a cut or wound over the right eye. It had turned black, and was not bleeding.

Appellant was taken to Dr. Wilford Wilson's office. While being examined for injuries, he stated that he and Mrs. Cooper had gone to the dump to dispose of trash. With completion of this task appellant got back into the truck as Mrs. Cooper started the engine. The motor was "racing" violently. Appellant said he at first thought Mrs. Cooper was merely joking and that the accelerator had been purposely depressed, but when she exclaimed, "George, do something," he realized that his wife was alarmed. Just then the machine lunged forward. This

the defendant's life, and whether such value could be used to convert the contract into a paid-up policy. (h) Evidence regarding a so-called "tarp" found near the city dump was improperly excluded. (4) Erroneous instructions were given and instructions to which the defendant was entitled were refused.

witness was not certain that Cooper said he leaned forward for the purpose of turning off the ignition. But, in any event, the statement was made that before anything could be done the car was in motion, and "all of a sudden went over." Cooper claimed to have been hurled through the windshield, while his wife was thrown to the left through an open door. Blood was found on the right-hand "jump seat," and there was blood on the "sill" where the right-hand door "fastens up against it." A subsequent examination of the opening through which Mrs. Cooper was said to have been hurled disclosed that the door functioned imperfectly and would only open half way. A six-inch maple limb, perhaps ten feet long, was tight against the left fender, one end extending into the rubbish pile. The witness who drove Cooper's car to Bentonville December 24th testified that the foot-feed functioned normally for an old car and that neither the throttle nor steering mechanism was out of order, and headlights were in good condition.

A heavy steel Firestone Company drum used for shipping anti-freeze compound was in the rear of the truck. Its capacity is 54 gallons. A nine-inch hard rubber detachable extension of the old-fashioned gear-shift lever, with a heavy two-inch knob, was described by one state witness as "a convertible gearshift knob and blackjack."

Deputy Sheriff John Black [2] testified that tire-marks left by Cooper's truck disclosed movements on the evening of December 23d immediately before the car went over the embankment. According to this witness it was certain that from a point touching some cut-off branches of a plum thicket, the machine proceeded in a southeasterly direction, veering slightly to the left, along an old graveled highway. Skidmarks indicated that the truck had been suddenly started, that it proceeded a distance of 35 or 40 feet, then turned sharply to the left and dropped into the dump, coming to rest when the front end and wheels were impeded by the soft material

[2] Black is the witness whose testimony regarding Cooper's statements in the doctor's office, position of the automobile, the blackjack, barrel, etc., has been referred to.

beneath. Disturbed condition of the gravel for a distance of eight or ten feet convinced the witness that the clutch was suddenly engaged after the engine had been "raced"—supplying, inferentially, a maximum of initial power.

The car windshield had been partially broken by impact from within. Perhaps half of the shatter-proof glass was out and a few pieces were missing when Black gave his testimony. Physical indications were that the break was caused from a blow struck approximately two inches from the bottom of the glass, on the right side. The opening was not, in Black's opinion, sufficient for a man's head to go through.

Contradictory Statements.—W. F. Burns, County Coroner, testified that on the evening of December 24th he and Mrs. Burns went to the Veterans Hospital to procure Cooper's permission for having an autopsy. While discussing matters connected with the death, Cooper said that when they drove to the dump he backed the truck to a point selected for unloading. He then got out of the car and Mrs. Cooper backed it about three feet farther. After disposing of the load Cooper took an old piece of canvas and cleaned the truck bed, then told his wife to "pull up." At the same time he put an oil drum in the car, then told Lois to pull up again. The accelerator stuck, causing the machine "to race around rather fast." Appellant says he ran and caught the car as it reached the dump, "jumping into it just as it went over." According to this explanation, the truck went down the hill about 75 feet and stopped suddenly, throwing Cooper through the windshield up to his shoulders, while Lois fell on the driver's side and went under a front wheel. It ran over her neck, and she "gurgled" and didn't speak again.

These representations by Cooper were testified to by Burns and his wife. The former said that he asked Cooper if Lois was insured, and received a negative reply. Burns says he then told Cooper that Clifford Fry, an agent at Gravette, had stated there was a $5,000 policy on Mrs. Cooper's life, with double indemnity in the event of accident. Cooper's reply was: "Yes, I remem-

ber that now, but it is a savings account policy." Cooper then said to Burns, "If you will sign the death certificate and get me out of this mess, it will be worth half of the five thousand to you." The witness said his understanding of the proposal was that the offer related to half of the double indemnity, or $5,000. Mrs. Burns testified that she talked with Cooper while her husband was out of the room typing a form authorizing the autopsy, and that Cooper intimated to her that he would pay $10,000 for the assistance inferentially suggested.

Motive Alleged by State.—Other than a small contract covering hospitalization, Mrs. Cooper was insured for $8,500 under three policies, each paying double the principal sum if death should be accidental. All were procured in 1948, the oldest July 20, the next October 21, and the last December 6. If realized upon, appellant as beneficiary would receive $17,000.

There was evidence from which the jury could have found that the Coopers were not domestically harmonious, although some witnesses thought they were. At one time the couple had accumulated approximately $6,000, most of it put aside by Mrs. Cooper while her husband was with the armed forces. This, however, had been used, or virtually spent. Cooper operated a radio and electrical repair shop, maintained in a part of the residence he and his wife occupied. They had been married 19 years, and were childless.

Supporting the State's contention that Cooper had grown tired of his wife and had formed other attachments, his connection with a young girl of good family and high scholastic attainment was shown. The girl was eighteen years of age when she testified, but was about seventeen when she met appellant, who soon made "improper advances" which were first repulsed; but, according to the testimony of this witness, Cooper told her "we might later be married." She was wholly inexperienced in sexual matters, and was so impressed by the attentions paid her and by Cooper's personality and seeming devotion that aloofness gave way to mutual desires, and for several months prior to the tragedy there were no inhibitions.

Their first experience consummating intercourse occurred in the basement of Cooper's home under his radio shop. Mrs. Cooper had gone to Joplin. The girl was persuaded by her lover to believe that Mrs. Cooper —represented by her husband to be without sexual reactions—did not object to the character of conduct she and George were engaging in, although there is no suggestion that Mrs. Cooper had specific information in respect of person or persons her husband was turning to. The young witness related a conversation with Cooper in which he expressed a belief that Lois would not live long—possibly not more than two years, that she "might have a stroke," and in that case, said the girl, "We were to be married." Cooper also said that a child conceived as a consequence of his marriage to Lois "had been taken care of" because they were too young to rear it. The witness understood from what Cooper told her that a Doctor R.—had performed an abortion.

Cooper maintained a houseboat on Grand Lake in nearby Oklahoma. It was frequently used when he and his wife, the young witness and her mother and father (and sometimes a brother), went for outings. On such occasions Cooper would take individual members of the group for pleasure trips, being particular, at times, to arrange a private trip for the object of his immediate affections. The boat was provided with conveniences for the entertainment each looked forward to. So was a truck, to which and in which access was occasionally had. The trips, whether by boat or truck, were usually made at night. Some time in 1948 Cooper told the witness she might be wearing a ring before school was out. Respecting consequences of the illicit relations, the witness testified that on at least one occasion she expressed apprehension about being pregnant, or fear that pregnancy would result, but was reassured when Cooper told her "it just wouldn't happen"; he knew how to take care of that. Finally, the witness said that Cooper was the first person who had ever made love to her. Question: "And he professed to love you, and that he was going to marry you?" Answer, "Yes."

Cause of Death—Circumstantial Evidence.—While Cooper was in an ambulance, preparatory to entering Dr. Wilford Wilson's office the night Lois was killed, a superficial examination was made to determine whether appellant had sustained serious injuries. The Doctor, (over objections that any statements made by Cooper while he was being treated were privileged) testified that Cooper complained of intense pains in the right arm and shoulder. There were bloodstains on Cooper's face, but no cuts, abrasions, or lacerations on either hand. The Doctor "imagined" the facial stains were from a scratch, but because of Cooper's eligibility to the Veterans Hospital, Dr. Wilson called that institution by telephone and told the physician in charge that a "badly injured man" was being sent over.

In describing to Dr. Wilson circumstances attending the so-called "accident," Cooper said that while at the dump he told his wife to get in the car and start it. When she complied with this direction, the car began "running around." Lois called for help, and Cooper "hopped in and turned off the switch, and just as this was done the machine went over the dump and a barrel in the car hit [me] in the back and knocked [me] through the windshield."

Dr. Stewart Wilson, connected with the Medical Center at Rogers, made autopsies on Mrs. Cooper's body at Pyeatte's Funeral Home in Gravette. There was a deep, ragged laceration on the back of the head, but no blood, in the occipital region. Several minor tears extended out from it, particularly upward. A small amount of blood, tinged with embalming fluid, was found in the hair. Bits of dry leaves and dirt were mixed with the hair, especially in the back. Numerous minor bruises and scratches were "scattered" over the entire body, the more severe being on the anterior surface of the right thigh and about the right eye and mouth. Some dried blood was found in each nostril. In examining the back of the head Dr. Wilson felt "something," and as he expressed it, "I didn't quite know what it was, but when I pulled it out it proved to be a large valve stem, caught on the hair, and more or less tangled with it."

The leaves found in Mrs. Cooper's hair were not stained with blood. Within the chest there were no indications of injury—no blood, nothing to suggest that the body had been crushed. A bruise under the skin caused by force was the result of [subcutaneous] bleeding. No injury to the abdominal walls had been sustained.

In examining the scalp a considerable quantity of clotted blood was found beneath it, without evidence of external bleeding. A small puncture wound through the scalp on the right side of the head was observed, extending inward. "You see," said Dr. Wilson, "the skull bone is in two layers, with soft spongy [matter] between. This punched-out hole went only through the outer table, producing a slight depression or fracture of the inner table. It caused a hemorrhage of the brain approximately two inches in diameter, although the brain structure proper was not lacerated." Assuming the injury to have been caused by the valve stem, a test was made to determine whether the wound corresponded with physical proportions of the metal. By rotating the stem in a way demonstrated to the jury, perfect contact was made.

Two days later Dr. Wilson reëxamined the body, with particular reference to neck, lungs, larynx, trachea, thyroid glands, esophagus, etc., and did not find any evidence of injury; nor were vertebrae or any other parts of the body injured in a manner to have caused death.

In summation of his testimony, Dr. Wilson said:

"The wound higher on the head inflicted by the valve stem [came] first. There was considerable hemorrhage as a result of that injury, indicating that the girl was very much alive at the time. As far as the laceration on the back of the head was concerned, ... it occurred either after death or when she was almost dead. I do not think that [the two] were inflicted at the same time. . . . There were bluish-black discolorations involving both eyelids and the surrounding areas, and over the bridge of the nose. In other words, she just had a black eye. . . . There was considerable swelling over the lips, but not much discoloration."

Distance from the valve stem wound to the laceration was approximately four and a half inches. It was the Doctor's opinion that the lower wound was made by "a dull article, [because] it wasn't a clean cut. The skin was more broken than cut."

It was Doctor Wilson's opinion that, primarily, the wound made by the valve stem caused death, and that other injuries were contributory.

Appellant's Testimony.—In explanations relating to the oil drum, Cooper testified that he used a gasoline stove in his home. It required repairing, and the drum in his truck the night Mrs. Cooper was killed had been procured for use as a pressure tank. One end contained two openings, a large "tap" or bung approximately two and a quarter inches in diameter, and a smaller threaded hole diagonally across, and near the rim. The small hole had been closed, but the larger tap had been drilled in such manner that a truck valve stem could be inserted and made leak-proof. By this means a foot- or hand-pump could be attached to the stem and air forced into the drum. The drum, when partially filled with fuel, could thus be put under pressure and fuel fed to the stove through pipe connections.

The night Mrs. Cooper lost her life she and appellant put the oil drum in the truck, intending to take it to a filling station for gasoline. Cooper testified that when they arrived at the dump he got out of the car and with the aid of a flashlight gave directions, while Lois backed the machine to a spot where trash was usually unloaded. After getting rid of the load, appellant swept the truck bed, then had Lois pull up about three feet. First, however, he had removed the oil drum, placing it immediately back of the car to hold open the door on the west side. The debris was in sacks, but some sifted through to the car floor. A canvas was used for cleaning purposes. "Then," said the witness, "I set the barrel back in the car, closed the door, ran around, and jumped in, laid the flashlight behind the seat, and we started up normally. I didn't notice anything wrong except that as the motor was 'fed' it started to race.

. . . I thought [Lois] was just playing, (we do that a lot of times: would take off in that [way] and spin the wheels quite a little way); but she made this 'arc,' and she called for me to help her. I reached with my foot for the accelerator and grabbed the key. I broke the [key] chain and had to reach a second time to turn off [the ignition]—I believe I got it turned off, but can't swear to it—because at the same time I got it (I turned the key off) this car went off the embankment with the lights still shining in front. It looked like a black hole down there with no bottom to it. I threw one arm in front of me (indicating) and the car seemed to hit with its front end."

The witness then said he struck his head on the windshield, in consequence of which a tip of the nose was cut off. He added, further, that there were scratches on the side of his face, a split place on the mouth (presumptively caused when a tooth cut it), and "I cut my neck trying to get my head back through the windshield. It 'bulged out' where I tried to get my head back, forming a trap. I had to take my hand and push [the glass] to the side to get my head out."

The next thing appellant could remember, he was sitting or squatting on the right side of the car. He was outside "feeling his face" until Lois called:—"I then went back through the car. The seats were turned down and this barrel was crossway on top of the back of them. I pushed [the seats] back and pushed the barrel back in the truck and went *through* to her."

Lois, appellant said, was lying on her face "practically" in front of the left front wheel. The following details were given: "I tried to pick her up, but the left arm was numb. It wouldn't work—just felt like it belonged to some one else. I put her left arm around my neck and tried to pick her up, and couldn't. Then I turned her over and put both arms around my neck and told her to hold on. At that time the car came forward and the front of the fender hit me and also seemed to catch her. She [said something like] 'don't give up,' or 'don't leave me.' I tried to extricate her by digging

cans out from under her; it seemed like the front wheel had her caught, like it was coming across from the left side. . . . Then [after digging cans] I got a pole that had a piece of wire on it and tried to pry the car up to get her away. . . . The wheel didn't seem to hurt her. She could talk to me and she actually did, but those [few] words were all I can recall. Well, [the car wheel] didn't seem to be on her real tight, . . . but I couldn't get her loose: then she made a funny noise. I thought it had crushed her or something. It was a gurgling sound in her throat. I took my left hand and wiped off the side of her face and got a whole handful of blood."

Appellant said that after continuing unsuccessfully to give relief, he went "back in the truck" and hunted for the flashlight, but couldn't find it. Being "half crazy" with fear and apprehension, he tried to start the car "and drive it off down in there to get it off of her. It wouldn't start, but the effort seemingly caused the flashlight to fall on the floor board. I grabbed it and went back [to Lois] and found she wasn't pinned very tight. I got her by the hair of the head, and then, when she did come out from under it, a lot of cans came out with her, and we all fell off right in front of the wheel. There was almost a sheer drop for several feet, and I fell backward and took her with me. I fell more than once."

Cooper, when asked by his attorney regarding these movements, replied that he had formerly made the statement that the fall was about 70 feet. He had tried twice to pick Lois up, but fell both times. As a result of the first attempt they rolled a little way. After trying a second time, he placed Lois on the ground, straightened up her clothes, then went for help. He claimed that at that time he was unable to stand alone, and had to crawl to the highway.

Appellant remained approximately two weeks in Veterans Hospital. Dr. Mulkey testified that he first saw Cooper the night of December 25th. The patient appeared to be in considerable distress and complained of pains in the lower portion of his back and in the right

shoulder. There were numerous scratches about his face—"rather deep scratches, bruises and abrasions." On his shoulder there were contusions. The back muscles were rather stiff. At times the shoulder was dislocated, but on other occasions it was not. The Doctor thought this might be accounted for by the position of the patient's arm when examinations were made. Urinary tests showed traces of blood cells, indicating a kidney injury, new or old.

Notes Taken at the Inquest.—Appellant complains that stenographic notes of his testimony, given at the inquest, were improperly admitted—a matter treated under a different heading in this opinion. According to this evidence, appellant was driving the truck when the dump was reached, and turned to the south; but his wife backed it to a designated position—a distance of perhaps three feet. Appellant didn't know of any [tree or bush limbs] that were in the way. While standing at or near the back of the truck he threw to the ground, or dropped, the canvas with which the car was cleaned after the trash had been disposed of, then placed the oil drum in the truck in an upright position. The motor was running when Lois "pulled up a little to let me clean out [the bed]".

Appellant further testified that the truck was not in motion when he got back into it. First, ["originally"] the car started slowly. Cooper had stated that Lois was a good driver, and he appears to have repeated the statement that she was at the wheel, that the headlights were on, and that when they got to "the hill" the car "couldn't have been going very fast [because] it was in low or second gear."

A sudden stop, Cooper testified, caused him to "run his head *into* the windshield." He didn't know whether his head actually went through the glass, but it caught him "back of the ears here when I tried to get out." After the impact Lois told him she was "bad hurt." Then he said: "I started to pick her up and the car dropped something like two feet. The upper part of the window caught my shoulder, and up in the front

where the bumper and the springs are fastened on and caught on the back of her head—it looked like her neck—and I dragged her back from under that and got her turned over, and the car kept 'settling' on me—[came down a second time]. It didn't make any sudden move; just gradually came on down and caught—I think it was—her clothing, but I couldn't get her out. It came down over the top part, on her neck, or somewhere along in here," (indicating).

Cooper said he was trying his best to hold the wheel off of his wife's body, "and when it got on her it didn't seem to hurt so bad, [for] she could still talk to me; then something 'gave' under the car. I was digging the cans out and it smashed my thumb and caught me for a little while, but I got loose. . . . When it passed down she made gurgling sounds and never did talk to me any more, and I lost my head, I guess. [Then] I got in the car and tried to drive it off—tried to lift on the back bumper, and it was going on over the dump. I went around the car and hunted for a pole or anything I could get to pry with, then I got her by the hair of the head and by the coat, and pulled. [But just before that time] the car wheel was on her left chest: had rolled over her—no, it came across this way," (indicating the neck).

There was repetition of the statement that when Lois was extricated "they both went to the bottom [of the ravine]". Appellant "guessed" that an hour—"I don't believe it was over that"—elapsed between the time the car went over the embankment "until we landed down the hill." During that period he frantically dug in the debris with both hands.

Touching upon domestic relations, appellant testified that he didn't remember any difficulty of a serious nature. On two occasions he had slapped Lois and had once broken her glasses. Regarding the young lady who told of their sexual escapades, appellant admitted that he "worshiped" her, but coupled with this declaration was the assertion that his wife was also fond of the girl, and that the attachment sprang from the circumstance

that the child they lost (had it lived) would have been the same age. At another period in his inquest-testimony, appellant said, "I am not hurt: I'm not complaining one bit."

Summation of Factual Status.—When full effect is given the rule that the demeanor of a witness who is heard by a jury may be taken into consideration, that a hesitant, halting, or evasive manner may at times reflect actuality with as much conviction as might be shown by affirmative statements; and when the contradictory nature of appellant's different explanations is compared with rationale reached by the medical experts, the conclusion, then, is inescapable that there was substantial basis for the verdict. There was positive testimony that death was caused by the head wound,—a wound, as Dr. Wilson said, that corresponded in area and in other respects with the valve stem.

The jury was warranted in believing from Cooper's lack of frankness, and want of consistency with explanations, that the truck was intentionally wrecked. Condition of the skid marks sustains the State's theory that Cooper, not Lois, started the engine when the truck was at a standstill, accelerated the motor to such an extent that when the clutch was engaged the rear tires "spun" momentarily before gripping the ground, and that during this transaction Cooper steered the machine in a comparatively straight line until speed had been acquired, then pulled sharply to the left as he sought personal safety. The oil drum was in a position to have fallen against Mrs. Cooper's head; and in fact it did fall. The "bung" or tap admittedly prepared by appellant for reception of the valve stem was broken, and the stem was in Mrs. Cooper's hair. A witness who drove by the rubbish dump at a time Cooper claims to have been trying to free his wife testified in a manner supplying negative contradiction of appellant's assertions.

Some witnesses thought Cooper had a "trick" shoulder, and they testified he had been known to dislocate the member to entertain his friends. The fact-finders no doubt (and they had a right to do this)

weighed the evidence of witnesses whose testimony was contradictory respecting the condition of appellant's hands following his alleged endeavor to dig in the debris where broken glass, tin cans, and sharp-edged or abrasive substances would have left their marks. There does not appear to have been a satisfactory answer to the natural inquiry, Why, if Cooper fell twice with his wife, or rolled down a precipitate embankment more than a hundred feet, were her garments, (including hose) virtually intact, and why did Cooper's wearing apparel show so little evidence of hard usage?

If Mrs. Cooper's death was caused by the valve stem when it was driven into her head as the oil drum fell against her, death was almost instantaneous. This was the Doctor's conclusion, hence conversations such as appellant testified to were highly improbable. The insurance, with double indemnity if death occurred through accidental means,—policies procured in recent months with annual premiums of more than $500—and admitted liaison with an immature girl who returned appellant's affections and had received his assurance that his wife would not live long; his reference to marriage and a wedding ring before school closed; the inferential offer of $5,000 to a coroner if he would assist in lifting the burden of suspicion; appellant's statement to witnesses who told him the girl friend had admitted their illicit relations, "Well, it's all over now: I hope you electrocute me; . . . . I'm ready to plead guilty",[3]—these facts and circumstances, when considered as a whole, could not be dismissed as baseless suspicion upon which accusation had been predicated.

The record covers more than 1,200 pages. Testimony has only been touched on in this review, each side having produced numerous witnesses. Our conclusions are that facts were sufficient for the jury to find that a motive existed, and that a predetermined course of action was pursued when the truck was driven to the

[3] This statement was materially weakened on cross-examination when the witness said appellant's language probably was, "I want to plead guilty; I am ready to be electrocuted; I'm ready to go, but I didn't kill Lois, [but] I want to plead guilty and get it over with."

dump. It follows that appellant's contention that the evidence was insufficient must be overruled.

Second—Competency of Juror Gene Thrasher.—On *voir dire* a list of all witnesses was read and prospective jurors were asked if they had discussed the case with any of them, or if, independently, they had formed or expressed an opinion. All who were accepted gave negative answers. In the motion for a new trial it was charged that Thrasher had talked with the Coroner and had been shown the valve stem found in Mrs. Cooper's head. Two witnesses, whose testimony at the hearing on appellant's motion to vacate the verdict was materially weakened on cross-examination, and one who asserted without equivocation that Thrasher had said Cooper was guilty and should be electrocuted, were used by the defendant to show that the juror had fraudulently procured a place on the panel.

Although statements made by these witnesses were not countered by the State, their assertions were heard by the same Judge before whom the original examinations were conducted. Thrasher had said he could and would give the defendant the benefit of all reasonable doubts, that he would be guided solely by evidence adduced at the trial, and that any preconceived ideas would be disregarded.

Courts properly examine very carefully into assertions made by witnesses who, after a defendant has been convicted, come forward with what they insist were beliefs expressed in circumstances from which bias or prejudice against the accused may be inferred. Weeks and months sometimes lapse between trial and what such witnesses say were remarks made at a time when the accused's status was being discussed. Because of the personal interest a volunteer may have in serving a defendant, and because the exact words used at a remote period, or the general import of a conversation, may later be purposely or unintentionally exaggerated, courts are given a broad discretion in determining (a) whether the evidence has been inspired through friendship for the defendant, (b) whether prejudice against

the State's representatives has induced the course of conduct, (c) whether memory of those testifying is at fault, and (d) whether, if true, the attributed declarations were anything more than random comment. If the latter, and the proffered juror convinces the Court that, as in the case at bar, he *has* tried the issues fairly and treated the facts with reasonable consideration, the motion to quash should be denied. Judges are not compelled to accept *all* testimony as true, even though it is not *expressly* traversed. The manner in which a witness acts on the stand, his general demeanor, the apparent presence of interest or an effort to serve some one,—these may deprive sworn statements of substantial characteristics; and in the exercise of a sound discretion the Judge who listens to such witnesses must resolve conflicting inferences and act as he conscientiously believes the circumstances warrant. We are not willing, in the instant case, to say that this discretion was abused.

Third—Improper Evidence.—When appellant objected to the Court's action in permitting Thelma Whitlow to verify, and testify from, the stenographic record she had made of appellant's examination at the inquest, he asked—in the alternative—that *all* the record be made available. When overruled he excepted. The Coroner's hearing was conducted December 29th. At that time Cooper had not been formally accused, nor is there evidence that the information had been drawn. It was filed January 7th.

Under authority of *Cole* v. *State,* 59 Ark. 50, 26 S. W. 377, appellant thinks prejudice resulted when excerpts from his testimony, as distinguished from a transcript of the entire examination, were admitted. But the Cole case does not stand for that proposition. It merely holds that where the purpose was to impeach the defendant, the transcribed testimony was the best evidence—not what a bystander thought he remembered the testimony to have been. Chief Justice BUNN, who wrote the opinion, said the better practice would be to produce the entire written record. We agree that complete fairness sustains this course. A prejudicial situation might be

reflected if appellant had shown by something more convincing than an objection that he was being placed at a disadvantage, in that emphasis was lost or the tenor affected for want of continuity when the Prosecuting Attorney selected questions and answers at random. This is not true here.

The Cole case was partially construed in *Guardian Life Insurance Company* v. *Dixon,* 152 Ark. 597, 240 S. W. 25, Judge HART's statement being that the cited case was a criminal proceeding "in which Cole was present at the Coroner's inquest and was suspected of being guilty of the homicide. Subsequently he was indicted for the murder of the deceased, and on his trial the court held that it was competent for the State to show what he had testified to at the Coroner's inquest because he was a party to it." See *Tiner* v. *State,* 110 Ark. 251, 161 S. W. 195; *Anderson* v. *State,* 197 Ark. 600, 124 S. W. 2d 216. In *Brown* v. *State,* 208 Ark. 28, 184 S. W. 2d 805, it was held that statements made by a claimant before Workmen's Compensation Commission regarding how a homicide occurred were admissible against him when he was subsequently indicted or informed against for murder, "in the absence of a showing that he objected to being made a witness or that improper means were employed to procure the statements."

An early leading case involving admissibility of testimony given at a Coroner's inquest is *People* v. *Molineaux,* 168 N. Y. 264, 61 N. E. 286, 62 L. R. A. (1904) 193. It was said that one called as a mere witness, who fails to claim a privilege on the ground that the testimony may tend to incriminate him, cannot object to its introduction at his subsequent trial for the commission of the crime originally under investigation.

Some of the matters complained of under subdivision (3) were not preserved by exceptions.

The contention that Dr. Wilford Wilson was appellant's physician when he made an examination the night of December 23d, if conceded, would not make reception of the statements erroneous under Ark. Stat. (1947), § 28-607, Pope's Digest, § 5159. The admissions were not

made for the purpose of supplying the physician with information necessary to any treatment. *St. Louis, I. M. & S. R. Co.* v. *Fuqua,* 114 Ark. 112, 169 S. W. 786. The exclusion of certain other testimony was objected to by appellant, but it was clearly self-serving and the Court acted correctly as to it.

Fourth—Instructions.—It is strenuously urged that Instruction No. 13 did not correctly declare the law. It told the jury that where the State relied entirely upon circumstantial evidence, "it is necessary in order to convict . . . not only that such chain of circumstances as a matter of law should point to and be consistent with the defendant's guilt, but that [the circumstances] should be inconsistent with any other reasonable hypothesis. That does not mean any more than this: that the facts and circumstances in the whole case, taken together,—if they convince you beyond a reasonable doubt of the guilt of the defendant, [they are] sufficient to convict him. If they do not convince you beyond a reasonable doubt, [they] are not sufficient to convict him, and you should acquit the defendant."

Specific objection was that the instruction did not tell the jury the State's proof "must be so convincing of [the defendant's guilt] as to exclude every other reasonable hypothesis."

The defendant was not entitled to the modification suggested. *Bartlett* v. *State,* 140 Ark. 553, 216 S. W. 33; *Bost* v. *State,* 140 Ark. 254, 215 S. W. 615; *Trammell* v. *State,* 193 Ark. 21, 97 S. W. 2d 902. The Trammell case approves an instruction in the exact language used in the case at bar.

Other instructions given, and those tendered and refused, have been examined. We do not find that error was committed, and the judgment is affirmed.

Mr. Justice George Rose Smith dissents.

George Rose Smith, J., dissenting. I disagree with the majority in only one respect. Thelma Whitlow acted as the reporter at the coroner's inquest and was a witness at the trial below. The State elicited from her many

excerpts from appellant's testimony at the inquest. The prosecutor's questions usually began with words, "Did he say . . .", and were so framed that the jury heard only the precise words that the prosecuting attorney selected. A typical question and answer were: "Did he say whether or not after he got her out on her back the car kept coming on slowly and finally came across her chest gradually?" "He said that it did."

It is evident that this procedure entails a possibility of real unfairness to the defendant. The State could, by choosing short excerpts from the former testimony, introduce statements that would appear to be far more damaging to the accused than they would seem if the context were known. For this reason it is the rule that if the State introduces an admission or confession made by the accused, he in turn may introduce whatever explanatory statements were made at the same time. *Williams* v. *State,* 69 Ark. 599, 65 S. W. 103. For instance, if the State should prove that the accused said, "I killed my wife," he may of course show that the entire sentence was, "I deny that I killed my wife," or that it was, "I killed my wife, but it was an accident."

In this case the appellant asked that the entire record of his earlier testimony be put in evidence; I agree that the request was properly denied. But the appellant's attorney then asked that he be permitted to examine the transcript from which the excerpts were taken. I think it was error to refuse this request. The statute directs that the transcript of the proceedings at the inquest be turned over to the prosecuting attorney. Ark. Stats. (1947), § 42-325. The accused is not supplied with a copy. He cannot in fairness be expected to remember every word that he said at the inquest some months before. A belated explanation from the witness stand would not appeal to the jury nearly so strongly as would proof that the explanation had been made in the first instance. Thus if the accused is denied access to the transcript from which excerpts are read, his right to introduce contemporaneous explanations is actually destroyed. I think that we have now sanctioned a pro-

cedure by which the State in some cases might distort even an assertion of innocence into a confession of guilt.

ATHA *v.* STATE.

4565 223 S. W. 2d 188

Opinion delivered October 3, 1949.

John Owens and *Geo. E. Steel,* for appellant.

Ike Murry, Attorney General and *Arnold Adams,* Assistant Attorney General, for appellee.

FRANK G. SMITH, J. Two indictments for misdemeanors were returned against appellant for the illegal sale of intoxicating liquors. In one, No. 363, the illegal sale was alleged to have been made to one J. R. Hudson, and in the other indictment No. 365, the sale was alleged to have been made to one Harry Golden. He was tried upon both indictments at the same time. He was found guilty by the jury of making a sale to Hudson and not guilty of making the alleged sale to Golden, and he has prosecuted this appeal to reverse the judgment rendered on the verdict finding him guilty. For the reversal of this judgment appellant alleges the insufficiency of the testimony to support it, and that it was error to put him on trial on both indictments at the same time.

As to the sufficiency of the testimony, it may be said that a discriminating verdict was returned. There was not sufficient testimony to support a finding that a sale had been made to Golden and appellant was acquitted on that charge, but there was positive testimony, although disputed, of a sale to Hudson.

As to the consolidation of the cases, it may be said that under Initiated Act No. 3 of 1936, § 20, Par. 5, appearing as § 43-1010, Ark. Stats. (1947) these sales might have been charged in a single indictment without appellant's consent. It was not error therefore to do subsequently what might have been done originally. This is especially true here as the record, which is somewhat ambiguous, but is no doubt as definite as appellant wished it to be, appears to reflect the fact that while appellant did not consent to the consolidation, that order was made without objection. Halley v. State, 108 Ark. 224, 158 S. W. 121; Silvie v. State, 117 Ark. 108, 173 S. W. 857; Drifoos v. State, 117 Ark. 491, 175 S. W. 1169; Davis v. State, 118 Ark. 31, 175 S. W. 1168.

Finding no error the judgment is affirmed.

HOUSTON *v.* STATE.

4566 223 S. W. 2d 188

Opinion delivered October 3, 1949.

[redacted]

E. J. Butler and *O. H. Hargraves,* for appellant.

Ike Murry, Attorney General, and *Jeff Duty,* Assistant Attorney General, for appellee.

HOLT, J. January 9, 1948, appellant, a Negro, using a .32 caliber pistol, shot and killed William Irvine, a Negro boy about 18 years of age. Thereafter, appellant was charged with first degree murder and a trial resulted in his conviction of murder in the second degree, and his punishment fixed at 7 years in the State Penitentiary.

From the judgment is this appeal.

For reversal, appellant contends that there was no substantial evidence to support the verdict. He admitted the killing, but argues that it was done in the necessary defense of his person "or his habitation," and that in any event he could be guilty of no greater crime than manslaughter since there was no evidence of malice, expressed or implied.

The instructions are not questioned.

The only question presented is one of fact and when we consider the evidence in the light most favorable to the State, as we must under our rules, it was substantial and ample to support the jury's verdict.

On the night in question, a party was in progress in appellant's restaurant and "beer joint" in the town of Madison. The victim, William Irvine, and two other boys came to the cafe where they remained for a short time drinking beer. For some undisclosed reason, William Irvine and appellant became engaged in an argument and Irvine and his two companions were ordered by appellant from the cafe. Following their departure, the appellant summoned an officer who came immediately and found the boys in another cafe nearby. The officer placed the boys in his automobile and started to take them to their homes, but upon learning that their truck was parked near the cafe, the officer brought them

back to the vicinity of the cafe and let them out of hi car. During this time he had searched the deceased an found that he carried no weapon.

Immediately after the boys left appellant's cafe appellant armed himself with a .32 caliber pistol which he placed in his pocket. When the boys left the officer the appellant was standing just outside the door of his restaurant. The deceased spoke to him saying, "Roy, I will see you." Appellant answered: "You can see me now, you black s—of—a—b" and at the same instant drew his pistol and shot the deceased inflicting a wound from which he died several days thereafter. At the time William Irvine was shot he was standing on the edge of a ditch which separated him from appellant. The deceased fell forward into this ditch. Irvine made no threats toward appellant. Immediately following the shooting, appellant ran from his cafe through a rear door and escaped to Memphis, Tennessee, where he remained several days before returning to Arkansas.

The killing here was done with a deadly weapon and the jury was warranted in finding that there was no justification or excuse, in the circumstances, for the appellant's act. Therefore, malice will be implied.

In the case of *Townsend* v. *State,* 174 Ark. 1180, 298 S. W. 3, this court said: "Whether an offense is murder in the second degree or manslaughter depends upon the presence or absence of malice which may be expressed or implied. The law implies malice where there is a killing with a deadly weapon and no circumstances of mitigation, justification, or excuse appear at the time of the killing. Inasmuch as no one can look into the mind of another, much latitude is allowed in the introduction of testimony on the question of motive, and the only way to decide upon the mental condition of the accused at the time of the killing is to judge it from the attendant circumstances." See, also, *Bly* v. *State,* 213 Ark. 859, 214 S. W. 2d 77, which reaffirmed the above rule.

We said in *Reynolds* v. *State,* 211 Ark. 383, 200 S. W. 2d 806: "Whether the death of Ashley resulted from the unlawful acts of appellant, as charged in the

information, or whether it was justified, as appellant insists, on the ground of self-defense, was clearly a question for the jury to determine."

It appears to be undisputed that appellant fled from the scene of the killing immediately thereafter. In *Herren* v. *State,* 169 Ark. 636, 276 S. W. 365, this court said: "The flight of a person charged with the commission of a crime has some evidentiary value on the question of his probable guilt. Stevens v. State, 143 Ark. 618, 221 S. W. 186." See, also, *Ford* v. *State,* 205 Ark. 706, 170 S. W. 2d 671.

No error eppearing, the judgment is affirmed.

WILLIAMS *v.* STATE.

4572 223 S. W. 2d 190

Opinion delivered October 3, 1949.

Burke & Burke, for appellant.

Ike Murry, Attorney General and *Arnold Adams,* Assistant Attorney General, for appellee.

ROBERT A. LEFLAR, J. Nathaniel Williams was convicted of the felony of possessing an illicit still, and he appeals.

(1) The original information filed in this case omitted the name of the defendant from its charging sentence, as follows: " . . . accusing....., of the crime of possessing an illicit still committed as follows, to-wit: The said Nathaniel Williams in the County and State aforesaid, on the 12th day of December, 1948, did unlawfully and feloniously keep in his possession a still . . .", etc. After motion to quash because of this omission, the Court allowed the Prosecuting Attorney to amend the information by inserting the name of Nathaniel Williams in the blank therein. This amendment was permissible, and the Judge committed no error in allowing it, inasmuch as there could previously have been no doubt as to who was accused by the information. Under the circumstances the amendment related to form only. See Ark. Stats. (1947) § 43-1024.

Furthermore, after the motion to quash was overruled, the defendant pleaded guilty to the offense charged in the information. "A plea of guilty waives any defect not jurisdictional, and which may be taken advantage of by motion to quash or by plea in abatement." *Hudspeth* v. *State,* 188 Ark. 323, 326, 67 S. W. 2d 191, 192. Accord: *Weir* v. *United States,* 92 Fed. 2d 634, 114 A. L. R. 481.

Finally, the appellant failed to bring forward this exception into his motion to set aside the judgment. For that reason also it is without merit here.

(2) Appellant contends that his offense, as of December 12, 1948, when it was admittedly committed, was a misdemeanor only rather than a felony, and that he was improperly convicted and sentenced for commission of a felony.

Act 200 of 1949, making the possession of an illicit still a felony, was in force at the time of trial, but did not apply to an offense committed in 1948.

Act 206 of 1947 made the possession of an illicit still a misdemeanor only. This Act was vetoed by the Governor, then enacted over the Governor's veto on March 11, 1947, but with an inadequate emergency clause, so that it did not become operative until June 10, 1947, ninety days after the General Assembly adjourned. Ark. Const., Amdt. 7.

Act 391 of 1947 made the possession of an illicit still a felony. This Act included a valid emergency clause, was approved by the Governor on March 28, 1947, and became law on that day, effective at once.

Appellant's contention is that since Act 206 did not become effective until June 10, 1947, it was the later law, and repealed Act 391. This is not correct. Act 206 became a law on March 11, 1947, when it was passed over the Governor's veto, even though its effective operation was postponed ninety days by the Initiative and Referendum Amendment. And Act 391, enacted later, repealed all prior conflicting laws, including Act 206, whether they were then effective or effective only at some future date.

"Statutes do not always take effect upon their enactment but the effective date may be postponed either by virtue of their own provisions, or by the terms of a general law or a constitutional requirement upon the subject. . . . It sometimes happens that the legislature at the same session will enact two laws which are irreconcilable. Where this happens, the one which is the latest expression of the legislative will should prevail; the other will be repealed by implication." Crawford, Statutory Construction (1940) §§ 105, 313.

"As between two acts, it has been held that one passed later and going into effect earlier will prevail over one passed earlier and going into effect later. Thus, an act passed April 16th and in force April 21st was held to prevail over an act passed April 9th and in effect July 4th of the same year." Lewis' Sutherland on Stat-

utory Construction (2d Ed., 1904) § 280, citing *Dewey* v. *Des Moines,* 101 Iowa 416, 70 N. W. 605. And see *People* v. *Mattes,* 396 Ill. 348, 71 N. E. 2d 690.

That the legislative intent of the 1947 General Assembly was in accord with our conclusion, favoring Act 391, is shown by its Calendar, establishing that final action on Act 391 was taken in the legislature itself, and not merely by the Governor, after Act 206 had been passed over the Governor's veto.

Enactment by the 1949 General Assembly of a law (Act 200) repeating the provisions of Act 391 of 1947 proves no more than that there was confusion as to which 1947 enactment was the law, and the 1949 legislature wanted to end the confusion as soon as possible. It has no tendency whatever to establish a 1947 legislative intent that the rejected Act 206 should prevail.

The judgment of the Circuit Court is affirmed.

STREET IMPROVEMENT DISTRICT No. 1 *v.* COOPER.

4-9003 223 S. W. 2d 607

Opinion delivered October 10, 1949.

Rehearing denied November 7, 1949.

Charles I. Evans, Jeptha A. Evans and *W. L. Kincannon,* for appellant.

Caviness & George, for appellee.

MINOR W. MILLWEE, Justice. Appellants are commissioners of Street Improvement District No. 1 of Booneville, Arkansas, organized for the purpose of paving certain streets in that city. On petitions presented to the city council, it found that they contained more than 66 2/3% of the assessed value of the real property within the proposed district and passed an ordinance creating the district. This ordinance was passed January 5, 1948, and published on January 8, 1948.

Appellees are four landowners in the proposed district and signed the petition for its creation. On February 4, 1948, they, together with other owners in the proposed district, filed suit in chancery court challenging the validity of the district on various grounds. On February 27, 1948, appellants filed a motion to require the plaintiffs in that suit to make their complaint, and an amendment which had been filed thereto, more definite and certain. In response to this pleading, the plaintiffs filed an additional amendment to their complaint.

On March 12, 1948, appellants filed a demurrer to the complaint as amended for the reason that it did not state facts sufficient to constitute a cause of action. This demurrer was sustained on March 29, 1948, and plaintiffs declining to plead further, a decree was entered dismissing the cause. There was no appeal from this decree.

In the spring of 1949, a contract was made for the construction of the improvements and assessment of benefits made and filed. The ordinance levying the assessment of benefits was published April 26, 1949. On May 24, 1949, appellees filed the instant suit to restrain appellants from proceeding with the improvement and challenging the validity of the district on the grounds hereinafter discussed. The answer of appellants contains a general denial of some of the allegations of the complaint and pleas of *res judicata* and the thirty day statute of limitations as to other allegations.

On final hearing the chancellor found in favor of appellees on two issues: (1) That there had been no ordinance passed by the city council fixing the grade of streets to be improved; and (2) that the commissioners were without authority to omit the improvement of certain lands in the southwest part of the district belonging to Mrs. E. M. Elkins. The commissioners were enjoined from proceeding with the improvement until an ordinance fixing street grades was passed and were ordered to proceed with the assessment of the Elkins property. The complaint was dismissed as to other matters pleaded by appellees. Both sides have appealed.

THE CROSS-APPEAL

Appellees' first contention is that the ordinance creating the district was void because of an error in publication thereof on January 8, 1948, and that the chancellor erred in refusing to so find. It is undisputed that the petitions and the ordinance as passed by the city council provide for paving on Bennett Avenue of two blocks 30 feet wide, one block 60 feet wide and the remaining six blocks 20 feet wide. The six blocks last mentioned are properly described as running from the "North line of Third Street to center line of Ninth Street." The ordinance as published makes the same provision as to the 30 and 60 foot paving but under the heading, "20 feet width pavement" lists the blocks to be paved on Bennett Avenue as running from the "North line of *Railroad Avenue* to center line of Ninth Street," which is the entire length of Bennett Avenue. Thus the 20 foot paving on Bennett Avenue was erroneously listed as beginning at the "North side of Railroad Avenue" instead of the "North side of Third Street" resulting in a duplication in description as to three blocks.

It is noted that the instant suit was begun more than a year after publication of the ordinance creating the district. Appellees were parties to the original suit in which a general demurrer was sustained and the cause dismissed. In that suit appellees filed a printed issue of the newspaper in which the ordinance was published as an exhibit to their complaint. The error was apparently clerical and the objection to the publication of the ordinance creating the district was a matter that could and should have been litigated in the former suit. An examination of the record shows that the pleading filed by plaintiffs in the original suit on March 3, 1948, was not an amended and substituted complaint as now urged by appellees, but was merely an amendment to the original complaint and that the court sustained appellants' general demurrer to the complaint as amended.

In *Tri-County Highway Improvement District* v. *Vincennes Bridge Co.*, 170 Ark. 22, 278 S. W. 627, this court approved the following statement by Chief Justice

WAITE, speaking for the court in *Alley* v. *Nott,* 111 U. S. 472, 4 S. Ct. 495, 28 L. Ed. 491: "A demurrer to a complaint because it does not state facts sufficient to constitute a cause of action, is equivalent to a general demurrer to a declaration at common law, and raises an issue which, when tried, will finnally dispose of the case as stated in the complaint, on its merits, unless leave to amend or plead over is granted. The trial of such an issue is the trial of the cause as a cause, and not the settlement of a mere matter of form in proceeding. There can be no other trial except at the discretion of the court, and, if final judgment is entered on the demurrer, it will be a final determination of the rights of the parties which can be pleaded in bar to any other suit for the same cause of action."

This court also held in *Stevens* v. *Shull,* 179 Ark. 766, 19 S. W. 2d 1018, 64 A. L. R. 1258 (Headnote 3): "Where the validity of an improvement district was sustained by the chancellor's decree in a suit attacking the validity thereof, such decree operated as a bar to all grounds of attack in subsequent suits which might have been interposed in the first suit; though there may have been different plaintiffs in various suits." The reason for the rule is set out in the opinion to the effect that unless matters which might have been pleaded are barred by the decree, there would be no end to litigation until the money of the parties or the ingenuity of counsel for suggesting additional grounds for attack had been exhausted. Many other cases supporting this rule are collected in West's Arkansas Digest, Vol. 11, Judgment, Key No. § 713 (2). Since we conclude that appellants' plea of *res judicata* is well taken, it is unnecessary to decide whether appellees were also barred by the 30 day statute of limitations. (Ark. Stats., (1947), § 20-108.)

■ Appellees' next ground of attack on the validity of the district is that cost of the improvements exceeds forty per cent of the assessed value of the real property of the district. In organizing the district it was discovered that none of the public and charitable property

located in the district had been listed on the county assessment records as required by Ark. Stats., (1947), §§ 84-459 and 84-460. On November 4, 1947, the tax assessor filed a list of such exempt property with the county clerk. The estimated cost of the improvement was $158,780.52, and the assessed value of all real property in the district as certified by the county clerk was $417,462. Appellees offered testimony to show that the exempt property had been valued by the clerk at actual rather than assessed value and that, if the true assessed value had been made, the cost of the improvement would have exceeded forty per cent of the total assessed value of the real property of the district.

Ark. Stats., (1947), § 20-108, provides for a hearing on the petition to determine whether two-thirds in assessed value of the property owners have signed the petition and further provides that the finding of the city council shall be conclusive unless attacked by suit in chancery court within 30 days after publication of the ordinance. It is true that appellees did not know the estimated cost of the improvement before expiration of the 30 day period, but they had knowledge of the filing of the list of exempt property and assailed it in their first suit and further alleged that owners of the necessary 66 2/3 per cent of the assessed value of lands had not signed the petition. The city council necessarily had to find the total assessed valuation of lands in the district in order to determine whether owners of the requisite two-thirds in assessed value had signed the petition. This finding became conclusive under the plain terms of the statute unless attacked within 30 days after publication of the ordinance and the trial court correctly determined this issue.

■ Appellees' next ground of attack is that the district assessors followed the front foot rule in assessing benefits which resulted in said assessments being arbitrary and discriminatory and not on the basis of benefits actually received. Appellees offered testimony showing assessments on only three pieces of property. On two of these the assessments amounted to $4 per foot. One of these tracts was owned by appellee, A. F. Tiffin, who

testified there was a tract one block north of his property with the same area and footage on which the assessment of benefits was slightly more than one-half the assessment against his property.

The assessors testified that in making the assessments they considered each of the 578 tracts separately and took into consideration whether the property was business or residence property, vacant or improved, the distance of improvements from the pavement, the width of the pavement, the front footage and other factors bearing upon a fair and proper assessment.

The finding of the chancellor that the assessment was validly made and that the assessors did not follow the front foot rule is not against the preponderance of the evidence. *Stevens* v. *Shull, supra,* and cases there cited.

■ Appellees next attack the validity of the district because of the following provision of a contract entered into by the commissioners: "The owner may, at any time before final completion of the work, by written notice, order additional work to be done, or any portion of work to be omitted or make any changes that may be deemed necessary or advisable." This is a separate ground of attack from that made with reference to omission of the Elkins property from the improvement which will be considered on the direct appeal. The mere making of the contract, though invalid, would not affect the validity of the district—at least until the commissioners actually propose to omit or do additional work under it. If and when this occurs, it will be time enough for the landowners to complain.

THE DIRECT APPEAL

■ Appellants say that appellees failed to show that the city of Booneville had not fixed the grades of streets as required by Ark. Stats., (1947), § 20-301. The city clerk, who could not be termed a witness friendly to appellees, testified that the earlier ordinance records were in a shoddy condition. He had found no ordinance fixing street grades, but would not say whether or not such had

been enacted. Evans Digest of the ordinances of the city adopted in 1936 did not contain such ordinance, but it did not include special ordinances adopted in connection with improvement districts. A former mayor for eight years testified that he knew the ordinances of the city about as well as anyone and that no such ordinance had ever been enacted to his knowledge. While this testimony was necessarily negative in character, we cannot say that the chancellor's finding that no ordinance had been passed fixing the grade of streets to be improved is against the preponderance of the evidence. Section 20-301, *supra,* does not require that the grades shall be established before the district is formed or the plans made, but contemplates that such grades may be established at any time when the improvement may be made in conformity therewith. *McDonnell* v. *Improvement District,* 97 Ark. 334, 133 S. W. 1126. It follows that the chancellor correctly restrained appellants from proceeding with surfacing of the streets until such ordinance is passed.

■ Appellants next contend the trial court erred in the following finding: "The Court finds and holds that it would be to the best interest of all the taxpayers in the improvement district to omit the unplatted land belonging to Mrs. E. M. Elkins in the southwest corner of the district from the improvement, but the Court is of opinion that the Commissioners are without authority to omit the proposed streets in the Elkins property from the improvement."

It is undisputed that E. M. Elkins owned a ten acre unplatted tract in the southwest section of the district which he wanted to develop; that he took the commissioners to the property and agreed to dedicate the streets and he and his wife signed the first petition for the improvement. After the district was created including his property, Mr. Elkins died and his widow did not wish to dedicate the streets or have the improvement made. The commissioners decided to eliminate the property from the improvement. We agree with the chancellor's conclusion that the commissioners were without authority

to omit the Elkins property even though it may now be to the best interests of all that it be excluded.

In the recent case of *Calico* v. *Huntsville Paving Improvement Dist. No. 1,* 215 Ark. 569, 221 S. W. 2d 769, we said: "While the details of construction may be left to the judgment of the commissioners, it is essential that the petition describe with certainty the improvement proposed. The landowners, not the commissioners or the city council, must decide what streets are to be paved. *Less* v. *Improvement Dist. No. 1 of Hoxie,* 130 Ark. 44, 196 S. W. 464." See, also, *Ahren* v. *Paving Improvement Dist. No. 53 of Texarkana,* 181 Ark. 1020, 29 S. W. 2d 265. If the commissioners could leave out the Elkins property, they might decide to omit other property when other landowners in the district may have signed the petition with the understanding that such property was to be included.

The decree is affirmed on both direct and cross-appeal.

RAPERT *v.* STATE.

4569 223 S. W. 2d 192

Opinion delivered October 3, 1949.

W. Leon Smith, for appellant.

Ike Murry, Attorney General and *Arnold Adams,* Assistant Attorney General, for appellee.

MINOR W. MILLWEE, Justice. Appellant was convicted in Blytheville Municipal Court of the offense of speeding. On appeal to Circuit Court the case was tried before the circuit judge sitting as a jury and appellant was found guilty and assessed a fine of $5.00.

The only question presented is whether there was substantial evidence to support the trial court's conclusion that appellant was driving a motor vehicle upon a highway "at a speed greater than was reasonable and prudent under the conditions then existing".

The facts are undisputed. Tom Smalley, a member of the State Police, testified: "Q. State to the Court the circumstances of the arrest; what caused you to arrest him and so forth. A. I was entering Blytheville on Highway 158, commonly known as the air base road. He passed me on the highway at a high rate of speed at the first curve just at the city limits. Q. What kind of a vehicle was it? A. A one and a half ton truck tractor. He was detached from his trailer. I turned and followed him for two and a half miles and stopped him at the first entrance to the air base. Q. Did you get by? A. Yes, sir, I clocked him. Q. Did you clock him? A. Sure, an accurate clock of 58 miles per hour. Q. You say he was driving a ton and a half tractor? A. Yes, sir, (Mr. Smith: You said, 'Tractor'. It wasn't a tractor, it was a truck.) Q. Was it a Chevrolet truck? A. Truck-tractor, that they pull a semi-trailer with. Q. Could you also put a bed on that and make a one and a half ton truck out of it? A. Yes, sir, it could be done. Q. The only difference between that and what is commonly known as a one and a half ton truck, you would just have to put a bed on that? A. Yes, sir. Q. And this has a fifth wheel to pull a trailer? A. Yes, sir."

Ark. Stats. (1947), § 75-601, prohibits the driving of any vehicle on a highway at a speed greater than is reasonable and prudent under the conditions then existing. It further designates certain speeds which, if exceeded, shall be prima facie evidence of unlawfulness. Sub-section (b) of the statute prohibits speeds upon the

highway greater than the following: "1. Passenger vehicles sixty (60) miles per hour. 2. Passenger busses and half-ton trucks fifty-five (55) miles per hour. 3. Trucks carrying five tons or less with brakes on all wheels forty-five (45) miles per hour. 4. Trucks carrying more than 5 tons and not more than seven and one-half (7½) tons, brakes on all wheels, forty (40) miles per hour. 5. Trucks carrying three (3) tons, without brakes on all wheels, trucks carrying seven-one-half (7½) tons or more and all school busses, thirty-five (35) miles per hour, providing, however, that school busses equipped with brakes on all wheels when carrying children over main highway on journeys attending athletic contests, etc., may be operated not to exceed 45 miles per hour." By Sub-section (c) a driver is not relieved from the duty to decrease speed when approaching and going around a curve by the fact that he is driving at a speed lower than the prima facie limits fixed by the statute.

Appellant contends that the vehicle operated by him is a "truck-tractor" as defined in Ark. Stats. (1947), § 75-403 (a) and not a "truck"; and that the speed of this type vehicle is not restricted by § 75-601, supra, other than it not be driven at a speed which would be unreasonable and imprudent under existing conditions. According to Webster's New International Dictionary, 2d Ed., the original meaning of "truck" seems to have been a strong small wheel, but the word is now applied generally to "any of numerous vehicles for transporting heavy articles." The vehicle here involved is what is commonly called a "bob-tail truck" in that it was being operated without a trailer. It is, nevertheless, a truck, and not a passenger vehicle, within the meaning of the statute. Under the evidence here it is unnecessary to determine whether § 75-601, supra, prohibits the driving of any truck at a speed in excess of 55 miles per hour.

The undisputed testimony shows that appellant was driving his vehicle at a high rate of speed on a curve "just at the city limits," and that the officer immediately pursued him for two and one-half miles and clocked his speed at 58 miles per hour. This evidence was substan-

tial and sufficient to support the judgment of the trial court that appellant was driving at a greater speed than was reasonable and prudent under the conditions then existing.

Affirmed.

IRELAND *v.* ROTENBERRY.

4-9017 223 S. W. 2d 498

Opinion delivered October 10, 1949.

Townsend & Townsend, for appellant.

Ward Martin, for appellee.

GEORGE ROSE SMITH, J. This is an action by several property owners in Street Improvement District No. 575 of the city of Little Rock, to enjoin the commissioners from laying pavement less than thirty feet in width. The

chancellor sustained the plaintiffs' position and issued the injunction sought by the complaint.

When the district was formed there was in force an ordinance adopted in 1926, which provided that the pavement should be thirty feet wide when, as here, the dedicated right-of-way is from fifty to fifty-nine feet across. The petition for the formation of this district did not specify the width of the proposed pavement. It described the improvement as the grading, draining, curbing, guttering and paving of certain parts of Pierce, Fillmore and "R" streets, "in such manner and with such materials" as the commissioners might deem for the best interest of the district.

The appellees' grievance centers upon the action of the city council in reducing the thirty-foot pavement requirement after this district was organized. The council found that thoroughfares crossing the three streets mentioned had already been paved. When that surfacing was laid the curbing turn-ins at the intersections with Pierce and Fillmore were constructed twenty-seven feet apart and those at "R" Street twenty-four feet apart. The council, recognizing the rights-of-way thus tentatively fixed, passed an ordinance reducing the pavement width for Pierce and Fillmore to twenty-seven feet and that for "R" to twenty-four feet.

The appellees do not suggest that the council's action in slightly reducing the width of these streets is arbitrary. Their position is that the 1926 ordinance was in force when the petition for the district was signed, thereby creating an implied contract with the city for a thirty-foot surface. This contention we think refuted by our holding in *Deane* v. *Moore,* 112 Ark. 254, 165 S. W. 639. There the petition contained a request that the city council reduce the width of the street in order to lessen the expense of the work. The council did narrow the right-of-way but later passed a second ordinance restoring its original width. In answering the property owners' attack upon the later ordinance we said: "The matter of fixing the width of the street was one which addressed itself to the city council, entirely apart from

the question of making the improvement. It had no proper place in the petition for the improvement, as the statute prescribes what the contents of the petition shall be. That request must, therefore, be treated as surplusage in the petition.'' The court added that a different question might have been presented if the request for a reduced right-of-way had been so worded as to constitute a condition to the landowners' consent to the improvement.

Thus the matter of fixing the width of these streets lay within the council's discretion. It is evident that compliance with the 1926 ordinance was not a condition upon which the property owners signed this petition, for it mentioned neither the ordinance nor the desired width of the improvement. If it be said that the petitioners are presumed to have known of the 1926 ordinance, it is enough to answer that they are also presumed to have known that the council may modify or repeal its earlier enactments unless vested rights have intervened. The appellees had no vested right in the continued existence of the earlier ordinance.

Reversed.

CAMPBELL *v.* ATHLETIC MINING & SMELTING COMPANY.

4-8808 223 S. W. 2d 499

Opinion delivered October 10, 1949.

Hardin, Barton & Shaw, for appellant.

Warner & Warner, for appellee.

FRANK G. SMITH, J. This case originated before the Arkansas Workmen's Compensation Commission by the filing of the claim by Emily Campbell, as widow and sole dependent of John Campbell, deceased. At the time of his death Campbell was employed as production foreman or maintenance manager of the Athletic Mining & Smelting Company. His duties, among others, required that he assemble materials used at the Smelter. The Brickey's Auto Salvage Yard had in stock some insulators, brackets and other like material needed by the Smelter Company and on April 12, 1945, after the close of the regular working day, Campbell, at the direction of his employer, accompanied by Paul Sidler, another employee, went to the Brickey's Yard for the purpose of getting material, and after loading it, he drove Sidler to the latters home and returned to his own. He arrived there about 5:00 p. m. and told his wife and the nurse who was attending her, Mrs. Campbell being ill, that he had been bitten or stung by a spider. He told his wife that at the time he was bitten it felt like he had stuck a splinter in his leg, and he exhibited a red area on his thigh as large as the palm of her hand, in the center of which there were two small puncture marks about one-fourth of an inch apart. Mr. Campbell informed the nurse attending his wife, who immediately attempted to locate and call Dr. Chamberlain, the family physician, but she was unable to locate the doctor that night and he did not see Mr. Campbell until the following morning. Campbell had a high fever during the night and the next morning a rash covered his body. The doctor treated Campbell by administering sulfanilamide drugs and making applications of hot compresses to the swollen area.

On April 16th Campbell's temperature dropped and the rash began to fade and the sulfa drug was discontinued. Campbell's thigh continued to swell and he appeared to be toxic, according to the testimony of Dr. Chamberlain, and on the 21st Campbell was sent to the hospital where his blood count revealed the presence of severe anemia; his red cell count being 1,690,000 compared with the normal count of 5,000,000. He was given blood transfusions of more than three pints of blood, with little improvement in his red cell count. He sustained a severe generalized convulsion. On account of the fulminating poison or toxemia present his heart began to show signs of failure and oxygen therapy was given. But despite these supportive measures Campbell died about 4:00 p. m. on April 24th. Such was the testimony of the doctor in attendance. Campbell told his brothers-in-law that he had been bitten by a spider and they testified that they saw puncture marks at the place of swelling. The death certificate prepared by the doctor gave the cause of death as acute hemolytic anemia, secondary to toxins of unknown origin.

The hearing on the claim was first had before a single member of the Workmen's Compensation Commission, who disallowed it. Thereafter the matter was brought before the full Commission for review, where it was again disallowed. An appeal was prosecuted to the Circuit Court where a judgment was entered affirming the order of the full Commission denying compensation, from which judgment is this appeal.

For the reversal of the Circuit Court judgment appellant contends that the testimony of Dr. Chamberlain and other witnesses indisputably reflects that the deceased was bitten by an insect of some type and from this bite some sort of toxin was introduced into Campbell's system, along with a streptococcal infection; or that the toxin injected by the insect rendered the deceased more susceptible to a harbored streptococcal infection; and that his death was the result of the susceptibility to the toxin injected by the insect bite or a sensitivity to the sulfa drug which was administered on account of the

insect bite, or a combination of these toxins, and that one or the other of such toxins produced a condition which led to the acute hemolytic anemia.

It appears to be undisputed that Campbell was infected with a streptococcus germ and Dr. Baerg, Prof. of entomology at the State University, who was not a medical doctor testified that a person who is infected with streptococcus germs would be affected by toxins from the bite of an insect otherwise calculated to be harmless.

Dr. Chamberlain testified that "In my mind as to the part the streptococcus played in the man's death, which would have been allayed by a post mortem examination (which was not held) is whether or not the toxin that entered his body upon the bite of the insect was causing the susceptibility of the sulfa drug administered or a combination of the two, to such an extent that his resistance to streptococcus infection either harbored in his system or introduced at the time of the bite became apparent in twenty-four hours. In my opinion one or the other combinations of toxins caused the man's death."

If it be said that the testimony recited would support the finding that the spider bite contributed to, if it did not cause Campbell's death, we are confronted with the express finding of the Commission that Campbell's death was not caused by the spider bite and that there was therefore no industrial injury compensable under the law.

The question is therefore not whether the testimony would have supported a finding contrary to the one made, but rather whether it supports the finding which was made.

The recent case of *Green* v. *Lion Oil Co., ante* p. 305, 220 S. W. 2d 409, it was said: "It is also well settled that the circuit court on appeal from the commission and this court on appeal from the circuit court must give to the findings of fact by the commission the same force and effect as the verdict of a jury or of the circuit court sitting as a jury. *Lundell* v. *Walker,* 204 Ark. 871, 165 S. W. 2d 600; *Sturgis Brothers* v. *Mays,* 208 Ark. 1017,

188 S. W. 2d 629. In determining whether there is sufficient evidence to support the award, both the circuit court and this court on appeal must weigh the testimony in the strongest light in favor of the commission's findings. *Hughes* v. *Tapley, Admrx.*, 206 Ark. 739, 177 S. W. 2d 429."

There was testimony to the following effect. No one saw the spider and there was testimony that the Brickey's place of business was cleanly kept and no one had ever seen any spiders there. Campbell was wearing at the time of the supposed bite, a pair of khaki trousers, and there was no testimony that a spider had crawled up inside of the leg thereof. Campbell made no comment or complaint to Sidler that he had been stung at the time of the alleged occurrence, and he made no effort to catch or kill the insect which had stung him. He drove Sidler home without mentioning the fact that he had been stung or bitten. The redness or rash was visible when he arrived at home and he ran a high temperature that night.

In addition to Dr. Chamberlain, three other physicians of equal eminence in their profession, testified and were of the unanimous opinion that even though Campbell had been stung by a spider, the symptoms which developed would not have developed from that fact under from twenty-four to seventy-two hours. In their opinion the streptococcal infection which caused Campbell's death existed for at least twenty-four hours or probably longer, prior to 4:30 p. m. April 12th.

The undisputed testimony shows that a pricking or stinging sensation is the common signal of the onset of streptococcus infection. Dr. Chamberlain as well as the other doctors, testified that this infection might exist for some time and not be noticed until the patient feels a stinging sensation in the infected area, and that the person stung will observe for the first time the inflamed, swollen condition and that "That represents the common mode of onset of streptococci skin infection." The expert testimony on appellees' behalf was to the effect that if Campbell sustained an insect bite between 4:15 and 4:45 on

April 12th, and streptococcal germs were thereby inserted into his body, fever would not develop by midnight, or the rash appear by the following morning from that cause. The doctors had never seen or heard of a case where streptococcal germs were introduced by the bite of an insect, but the infection sometimes results from scratching mosquito or chigger bites, but it is secondary to the scratching. The testimony is to the further effect that the bite of a spider, wasp, bee, or other small insects does not produce streptococcal infection, unless that germ is on the skin of the person bitten or on the proboscis of the stinging animal. The venom of the insect does not itself produce streptococcal infection, although it may immediately cause pain, redness, rash and swelling and the testimony of the expert witnesses is to the further effect that streptococci germs introduced by insect bites have to lie in the tissues and multiply to a certain number and elaborate their toxins and poisons before the tissues can react with local symptoms and the body with general symptoms. One of the doctors illustrated by saying that if he had a streptococci germ in his throat and coughed so that it gets into another's throat, that person will continue to be well for from three to ten days, or a minimum of three days when there would suddenly develop a sore throat, and temperature and in from twenty-four to forty-eight hours to develop a skin rash, that this is the clinical incubation period for the development of the rash.

The case presents a question of fact about which experts may differ and might be mistaken, but which is nevertheless a question of fact and the testimony is sufficient to support the finding that the streptococcal infection from which Campbell suffered and died was not caused by the bite of a spider or other insect, for the reason that a sufficient period of time had not elapsed after the supposed bite for the incubation of germs to cause fever and a rash.

If it be said that the testimony is almost undisputed that Campbell died from a streptococcal infection, it is by no means undisputed, or at all certain, that the in-

fection was caused by an insect's sting. It is agreed that the administration of a sulfa drug was the proper treatment for the infection, and it is also clearly shown that the administration of this drug tends to the production of an anemic condition, its effect being more pronounced in some cases than in others depending on the sensitivity or susceptibility of the patient to the drug, and the testimony warrants the finding that it was the administration of the drug which so greatly reduced Campbell's blood count.

The Commission's finding being supported by evidence sufficient to support that finding must be affirmed and it is so ordered.

MILLWEE, J., dissents.

[redacted]

McLEMORE *v.* HERIOT.

4-8980 223 S. W. 2d 502

Opinion delivered October 10, 1949.

[redacted]

Frank H. Cox, for appellant.

Townsend & Townsend, for appellee.

GRIFFIN SMITH, Chief Justice. Street Improvement District No. 567 was formed in Little Rock in order that certain paving might be done. The proceeding resulting in this appeal originated with a complaint by taxpayers who alleged invalidity of the organization because two

lots in Cedar Heights Addition were not included. A demurrer to the answer was overruled, hence the record alone is before us.

The controversy is based upon appellant's contention that failure to list for assessment purposes two tracts lying immediately north of West Twentieth Street was a jurisdictional error not susceptible of correction.

Block Four of Cedar Heights Addition was sought to be brought in under the designation, "Lots Four to Nine, inclusive, Block Four, all in Cedar Heights Addition to the City of Little Rock." The lots are in two tiers, No. 1 being the northeast, followed on the south by 2, 3, 4, 5, and 6. The second tier lies immediately west, with Lot 12 on the north. It will be seen that Lots 6 and 7 adjoin 5 and 8 on the south.

It is alleged that "a strip of ground 23 feet wide marked 'B' lies immediately south of Lot 6," and that the same condition exists as to Lot 7, the designation there being "A." But the complaint goes further and says that ". . . south of Lot 7 *in* said Block 4 the strip of land marked 'A' is to be found." Appellant thinks that the District's failure to mention Lots "A" and "B" requires an injunction against the proposed bond issue.

In an effort to cure the defect, if such existed, taxpayers favoring the District proceeded under Act 661 of 1919, Pope's Digest, §§ 7372-77, 2 Ark. Stats. 20-1101, *et seq.,* and procured from Pulaski County Court a judgment of correction. It is urged that the Act conferring this power upon County Courts is unconstitutional when applied to municipal improvement districts; or, if the Act *per se* be valid, the order affecting District 567 was void because it dealt with an indispensable prerequisite. *McRaven* v. *Clancy,* 115 Ark. 167, 171 S. W. 88.

We do not find it necessary to discuss either of these matters. Ownership of the property in question is not shown. In the absence of proof touching initial formation of Block Four, the Court could have found that these 23-foot "strips of ground" were parts of Lots 6 and 7. The only indications of severance are dotted lines run-

ning east and west. But it may be observed that a similar line is drawn across Lot 5, and there is no contention that the cut-off area was not a part of Lot 5. It is possible—even probable—that the dotted lines are arbitrary designations showing where the regular 50-foot lots would end, and that Lots 6 and 7, instead of being 50 feet wide, are 73 feet. We do not know that they would not be appropriately assessed, and the only question is whether the two 23-ft. strips are within the District. Not only does appellee's answer assert that one of the strips is "immediately south of Lot 6 *in said Block Four,*" but the demurrer admits this to be true. Since the two strips are similarly situated, one could not be within the block, and the other beyond it.

The case is not like *Riddle* v. *Ballew,* 130 Ark. 161, 197 S. W. 27, where the ordinance establishing a local improvement district omitted property included in the petitions. It was there said that it was for the property owners, and not the council, to determine what descriptions should be contained in the District. But in the case at bar the disputed area was in Block Four, and it is fairly inferable that each 23-ft. strip is a part of the parent lot.

Affirmed.

Mr. Justice FRANK G. SMITH concurs.

BARNES AND YORK *v.* STATE.

4568 223 S. W. 2d 503

Opinion delivered October 10, 1949.

C. F. Cooper and *Oscar Fendler,* for appellants.

Ike Murry, Attorney General, and *Robert Downie,* Assistant Attorney General, for appellee.

HOLT, J. Appellants, Barnes and York, Negroes, were convicted of the crime of grand larceny and the punishment of each was assessed at five years in the State Penitentiary. From the judgment is this appeal.

For reversal, appellants have brought forward in their motion for a new trial twenty-nine assignments of alleged errors. While they strenuously contend that the trial court committed reversible error by permitting their alleged confessions to go to the jury, over their objections, we find it unnecessary to determine this issue and the other assignments for the reason that the judgment must be reversed for the error alleged in appellants' fourteenth assignment, which is as follows: "The court erred, over the objections and exceptions of the defendants, in permitting the prosecuting attorney to refer to a statement made by Wilton Austin, who was never called as a witness and who was purportedly in jail with these defendants at the time they were being grilled and questioned; and which witness aforesaid, made statements against these defendants, and after said written statement of said witness, Wilton Austin, was attempted to be read to the jury by the prosecuting attorney, and ruled improper, permitted the prosecuting attorney to ask other witnesses what witness Wilton Austin said relative to these defendants; which was improper, hearsay, and highly prejudicial to the rights of these defendants, and tending to bias, prejudice and inflame the minds of the

jurors, and denying the defendants their constitutional rights of being confronted with the witnesses, both for and against them, as set forth in § 10, Art. 2 of the Constitution of the State of Arkansas, . . . and the right to cross-examine said witness."

The record reflects that on the night of November 4, 1948, a store building on the outskirts of Blytheville was forcibly entered and a metal safe containing $1,000 in cash and a number of checks was stolen. The safe was found November 7th in a Negro cemetery about a mile from the store. A large hole had been made in its side and the money taken. Suspicion fell upon appellants and another Negro, Wilton Austin, and on November 19th, appellants and Austin were apprehended and held by officers in Hayti, Missouri. The sheriff of Mississippi County, Arkansas, Mr. Berryman, was notified and went to Hayti, took charge of the three suspects and transported them in his car to Blytheville, Arkansas, and placed them in jail. Thereafter, alleged signed confessions were secured from both appellants and also Wilton Austin. Austin for some undisclosed reason was not offered as a witness and did not testify at the trial.

During the course of the trial, after having permitted the confessions of each of the appellants to be read to the jury, over appellants' objection, as indicated, the prosecuting attorney offered in evidence the alleged confession of Wilton Austin, but on appellants' objection, the court properly denied its admission.

Later on in the proceedings, counsel for the State, while cross-examining appellant, Barnes, with the alleged written confession of Wilton Austin before him, proceeded to read certain questions and answers from the Austin confession and interrogate Barnes as to the truth or falsity of Austin's statements and whether he was present when Austin's alleged confession was read to Austin. Much of Austin's testimony detailed in his confession was, in effect, damaging to appellants and tended to point to their guilt, and was allowed to go to the jury, over appellants' objection, on the theory that the jury might consider it for the sole purpose of its effect upon

the credibility of appellants. This was error for the reason that it denied to appellants the constitutional safeguard, vouchsafed them, to be confronted by the witnesses against them (Art. 2, § 10, Constitution of the State of Arkansas) and the privilege of cross-examination of Austin.

In the circumstances, this was hearsay evidence and improperly admitted. Barnes was being cross-examined relative to statements made by Austin in his confession and not by any statements which he, Barnes, was alleged to have made.

Wigmore on Evidence, Third Edition, Vol. 5, at page 3, § 1362, has this to say on the Hearsay rule: "The fundamental test, shown by experience to be invaluable, is the test of cross-examination. . . . 1. The theory of the Hearsay rule is that the many possible deficiencies, suppressions, sources of error and untrustworthiness, which lie underneath the bare untested assertion of a witness, may be best brought to light and exposed by the test of cross-examination. . . . It is here sufficient to note that the Hearsay rule, as accepted in our law, signifies a rule rejecting assertions, offered testimonially, which have not been in some way subjected to the test of cross-examination. . . .

"In the preceding passages, the testing required by the Hearsay rule is spoken of as cross-examination under oath. But it is clear beyond doubt that the oath, as thus referred to, is merely an incidental feature customarily accompanying cross-examination, and that cross-examination is the essential and real test required by the rule. That this is so is seen by the perfectly well-established rule that a statement made under oath (for example, in the shape of a deposition or an affidavit or testimony before a magistrate) is nevertheless inadmissible if it has not been subjected to cross-examination." See, also, 31 C. J. S., p. 919, §§ 192-193.

For the error indicated, the judgment is reversed and the cause remanded.

4579 223 S. W. 2d 505

Opinion delivered October 10, 1949.

J. Allen Eades, for appellant.

Ike Murry, Attorney General, and *Arnold Adams,* Assistant Attorney General, for appellee.

ROBERT A. LEFLAR, J. E. F. Campbell was convicted of the felony of involuntary manslaughter, and appeals.

J. R. Laney was killed on U. S. Highway 71 near Waldron in a collision between an automobile driven by defendant Campbell and one driven by Laney. Defendant alleges a variety of grounds for reversal of the judgment of conviction of involuntary manslaughter rendered against him for this killing.

(1) After the collision, the defendant pleaded guilty to an information for drunken driving filed against him

in a Justice of the Peace court in Scott County. It is not established clearly that the drunken driving to which defendant pleaded guilty was identical with his driving at the time of the fatal collision, but it may be assumed that it was. Defendant contends that it was identical, and that the conviction for drunken driving in the Justice of the Peace court bars this later charge of involuntary manslaughter growing out of the same act. This is in effect a plea of former jeopardy. The plea is ineffectual.

In *State* v. *Hall,* 50 Ark. 28, 6 S. W. 20, a defendant was indicted at the same time for murder and for carrying a pistol as a weapon. It was admitted that the two indictments related to the same transaction. In holding that this did not require the quashal of either indictment, the Court said: "But neither the offense nor the matter can be said to be the same, when the two indictments are so diverse as to preclude the same evidence from sustaining both and when each indictment sets out an offense differing in all its elements from that in the other, although both relate to one transaction. . . . A person might at the same time commit both offenses and be justly punishable for both. The two indictments would be entirely dissimilar; and a conviction or acquittal upon one would have no effect upon the other prosecution." In *Whitted* v. *State,* 187 Ark. 285, 59 S. W. 2d 597, a prior acquittal for bank robbery was held not to bar a prosecution for burglary growing out of the same transaction. "Since . . . the offenses charged against appellants were separate and distinct offenses, defined by separate and distinct statutes, and not dependent upon the same evidence to support conviction, the plea of former acquittal is not good, and was properly denied." *Ibid.,* 187 Ark. at 288, 59 S. W. 2d at 598. For cases expressly holding that a former conviction for drunken driving does not bar prosecution for a homicide arising from the same act, see *People* v. *Townsend,* 214 Mich. 267, 183 N. W. 177, 16 A. L. R. 902; *Utah* v. *Empey,* 65 Utah 609, 239 Pac. 25, 44 A. L. R. 558. These are different offenses, related not by definition but only by concurrence in time and space, and the situation here is not one in which the double jeopardy rule applies.

(2) Defendant contends that he was improperly prosecuted for involuntary manslaughter under Pope's Digest, § 2982, on the ground that the applicability of this section to automobile homicides was superseded by Act 300 of 1937, § 48, appearing in Pope's Digest, § 6706, Ark. Stats. (1947) § 75-1001. This Court held otherwise in *Phillips* v. *State,* 204 Ark. 205, 161 S. W. 2d 747, determining that the State might base its prosecution under such facts on either provision of the statutes. Apart from that, Pope's Digest, § 2982, was amended by Act 169 of 1947 to include expressly deaths proximately resulting from "injury received by the driving of any vehicle in reckless, willful or wanton disregard of the safety of others. . . ." Ark. Stats. (1947) § 41-2209. This was the law under which the present prosecution was maintained.

(3) Defendant also argues that there was insufficient evidence to sustain a conviction on the essential point of "lack of due caution and circumspection," or "reckless, willful or wanton disregard of the safety of others," in his driving. There was substantial evidence that he was driving while drunk, including not only his own plea of guilty to that charge, but also partly emptied whiskey bottles in his car, his testimony on the stand that he had taken three drinks, and the testimony of other witnesses that he seemed drunk or had whiskey on his breath at the time of the wreck. The decedent's wife, who was beside decedent in his car, testified that defendant was coming toward them fast on the wrong side of the road. The sheriff testified that the skid marks showed that both front wheels of defendant's car were on the wrong side of the road at the point of collision. There was evidence that defendant had bumped other cars a little while before the collision with Laney's car. The evidence is more than ample to sustain the jury's verdict.

(4) Defendant asserts that there was a marker put up by the State Highway Department near the point of collision, indicating a 55-mile speed limit for passenger cars, and on that basis alleges error in the Court's denial

of a requested instruction to the effect that if the defendant was otherwise in due care, "and was not driving his said automobile at a greater speed than 55 miles per hour at this given point, then you must acquit this defendant." The instruction was properly denied. The governing law requires that "no person shall drive a vehicle on a highway at a speed greater than is reasonable and prudent under the conditions then existing." Ark. Stats. (1947) § 75-601. Speed limits do no more than fix the maximum; they do not grant an indiscriminate license to drive at the indicated speed under any and all conditions, and specifically under the conditions indicated by the evidence in this case. See *Rapert* v. *State, ante,* p. 768, 223 S. W. 2d 192.

(5) Defendant also complains of the Court's denial of proffered instructions dealing with reasonable doubt and the presumption of innocence, but these matters were amply and accurately covered by other instructions given by the Court.

The judgment of the Circuit Court is affirmed.

SPRINGDALE MONUMENT COMPANY *v.* ALLEN.

4-9032 223 S. W. 2d 802

Opinion delivered October 17, 1949.

Rehearing denied November 21, 1949.

Harper, Harper & Young, for appellant.

Sullins & Perkins, and *Owens, Ehrman & McHaney,* for appellee.

HOLT, J. This cause is here on appeal from a judgment of the Circuit Court reversing an order and award of the Arkansas Workmen's Compensation Commission. We are asked on motion of appellees to dismiss appellants' appeal and affirm the judgment of the trial court for the reason "that the appellants failed to file a Motion for New Trial in the Washington Circuit Court after that court had entered judgment in this cause."

It is conceded that no motion for a new trial was filed by appellants. However, they earnestly contend that such motion was not required under the provisions of our original Workmen's Compensation Law (Act 319 of 1939),—which was in effect in 1946 when the alleged injury arose.

The question presented appears to be one of first impression. Pertinent provisions of § 25 of the act, after providing the procedure in taking an appeal to the Circuit Court from the Commission's order, are: "(b) * * * Such appeal may be taken by filing notice of appeal with the Commission, whereupon the Commission shall under its certificate return to the Court all documents and papers on file in the matter, together with a transcript of the evidence, the findings and award, which shall thereupon become the record of the cause. Upon appeal no additional evidence shall be heard and in the absence of fraud, the findings of fact made by the Commission within its powers shall be conclusive and binding. The Court, on appeal, shall review only questions of law and may modify, reverse, remand for rehearing, or set aside the award upon any of the following grounds and no other: 1. That the Commission acted without or in excess of its powers. 2. That the award was procured by fraud. 3. That the facts found by the Commission do not support the award. 4. That there was not suffi-

cient competent evidence in the record to warrant the making of the award.

"Appeal from the Circuit Court shall be allowed the same as in civil actions."

It will be observed that the section, supra, specifically provides that "the Commission shall under its certificate return to the Court all documents and papers on file in the matter, together with a transcript of the evidence, the findings and award, which shall thereupon become the record of the cause."

It is further provided that on the appeal to the Circuit Court "no additional evidence shall be heard and in the absence of fraud the findings of fact made by the Commission within its powers shall be conclusive and binding."

The rule is well settled that no motion for a new trial is necessary where error appears from the record itself. *Stevenson's Supreme Court Procedure,* Revised 1948, page 31.

" 'Neither a motion for a new trial nor a bill of exceptions is necessary where the errors complained of do not grow out of the evidence or instructions, but appear from the record itself.' " *Suit* v. *State,* 212 Ark. 584, 207 S. W. 2d 315. See *Ford* v. *State,* 100 Ark. 515, 140 S. W. 734.

It is also equally as well settled that no bill of exceptions is necessary where error is apparent from the record. *Stevenson's Supreme Court Procedure,* Revised 1948, page 47.

In the recent case of *Herron Lumber Company* v. *Neal,* 205 Ark. 1093, 172 S. W. 2d 252,—a Workmen's Compensation case, we said: "Section 25 of the Arkansas Workmen's Compensation Act provides that the duly certified transcript of the evidence heard by the commission, and the findings and award of the commission, shall 'become the record in the cause.' Under this provision of the statute a bill of exceptions on appeal to this court was not necessary, since the cause was tried

in the circuit court upon the record made before the commission, and a copy of this record, properly authenticated, has been filed in this court as a part of the record made in the lower court."

In the present case, it is conceded that no new evidence was taken in the Circuit Court, there being no allegation of fraud or that the Commission acted without or in excess of its powers. The Circuit Court, therefore, could consider and did consider only the record filed before it by the Commission, according to the plain mandate of the statute.

The identical question presented here was decided by the Supreme Court of Missouri in *State ex rel. May Department Stores Co. et al.* v. *Haid et al.*, 327 Mo. 567, 38 S. W. 2d 44. The provision of the Workmen's Compensation law there (§ 44) is identical with our § 25, supra. In this case the court said: "The precise question thus presented to this court for decision is whether, on an appeal from a final award of the Workmen's Compensation Commission * * * the evidence had and taken before the Compensation Commission, the documents and papers filed with the commission, and the findings of fact and final award of the commission, when certified and returned to the Circuit Court by the Compensation Commission, pursuant to the mandate and directions of section 44 of said Compensation Act, constitute the record of the circuit court, so as to be reviewable on an appeal from a judgment of the circuit court, duly taken and allowed to a superior court, in the absence, and without the necessity, of a motion for new trial and a bill of exceptions in the circuit court. * * *

"What we do decide and hold herein is that the matters, proceedings, and evidence had and taken in a compensation proceeding before the Workmen's Compensation Commission, and certified and returned by the Commission to the Circuit Court for its judicial review, intrinsically constitute the record of the Circuit Court in such compensation proceeding, by virtue of the express language and requirement of the Workmen's Compensation Act, and that such record of the Circuit Court is

reviewable on an appeal duly allowed and taken to a superior court from a judgment of the Circuit Court thereon, without the necessity, and in the absence, of a bill of exceptions and a motion for new trial in the Circuit Court."

This appears to be a correct, sound and well reasoned opinion and in accord with the great weight of authority.

As indicated, where, as in the present case, there was no new evidence or other proceedings in the Circuit Court, and the trial court reviewed the complete record certified to it by the Workmen's Compensation Commission, we hold a motion for a new trial was not necessary.

If, however, the Act should be construed to permit additional evidence to be presented to the Circuit Court, for example in cases where it may be alleged that the award was procured by fraud, we hold that a motion for a new trial would be necessary.

Accordingly, the motion to affirm is denied.

Justice George Rose Smith concurs.

George Rose Smith, J., concurring. I think the appellee's motion should be denied, but I am unwilling to say that the transcript of the proceedings before the Commission constitutes the record within the meaning of the rule that a motion for new trial is unnecessary when error appears on the face of the record. I should put the decision on the ground that the circuit court sits as an appellate tribunal in reviewing Workmen's Compensation cases on the record alone; so a motion for a new trial is unnecessary simply because there has been no trial at all in the circuit court.

Frank G. Smith, J., dissenting. The Workmen's Compensation Act provides for a review of the Commission's awards by the Circuit Court and that an "Appeal from the Circuit Court shall be allowed the same as in civil actions." Section 25, Act 319 of the Acts of

1939. The initiated Compensation Act which became effective December 3, 1948, has the same provisions. Jurisdiction was given to the Circuit Court and not to the Chancery Court in actions arising under the Workmen's Compensation Act. Such actions should therefore conform to the procedure of the Circuit Court which requires a motion for a new trial to review an error not apparent on the face of the record.

What is the practice in civil actions arising in the Circuit Court? It has been so often said that it has become axiomatic that on appeals to the Supreme Court from the Circuit Court the motion for a new trial is essential in all cases to review an alleged error not apparent from the face of the record, and by the face of the record is meant the judgment sought to be reviewed and the pleadings upon which it was based. It does not include the testimony heard at the trial. Appellant begins his brief by saying that the testimony does not establish the fact that claimant's death was caused by the injuries sustained. In other words, the facts do not support the award, and this is one of the four things which the courts may review. See Par. 3, § 25 of the Compensation Act. Certainly a motion for a new trial was necessary to call this alleged error to the attention of the trial court.

Motions for new trials serve a double purpose, the first, and of most practical importance is that it calls to the attention of the trial court an error complained of, and affords opportunity for correction by granting a new trial, if not otherwise.

The motion for a new trial simplifies the review of the case on appeal as it limits the review of the trial by the appellate court to those errors thought to be of sufficient importance to have induced an exception to some ruling of the trial court.

Now while the Compensation Act limits the matters which may be reviewed on appeal, yet there are four grounds for review, one of these being that the testimony does not support the award.

The same reasons and the same necessity for a motion for a new trial exists in the exercise of this limited right of review as exists in other cases, and this right of review, limited as it is, may be exercised as in other circuit court cases, which is by filing a motion for a new trial, calling the court's attention specifically to any alleged error. Common fairness to the trial court suggests this should be done and the statute so provides.

In the chapter on Workmen's Compensation Acts, 71 C. J., § 1185, p. 1244, it is said: "Although a motion for a new trial and exception to its refusal may be necessary to raise and preserve the question as to the sufficiency of evidence to support an award, and, in the absence of a motion for a new trial in the court below, an award cannot on appeal be changed with reference to testimony that was not made the basis of a finding below, nor may other questions involving an examination of conflicting evidence presented below be considered on appeal from the original proceedings, in the absence of a motion for a new trial therein, questions as to absence of evidence to sustain a judgment in compensation proceedings may be considered on review where such questions have been presented below by a motion for new trial." Among cases cited to support the text quoted is that of *Brocco* v. *May Dept. Stores Co.,* 22 S. W. 2d, 832.

The case of *State* v. *Haid,* 327 Mo. 567, 38 S. W. 2d 44, cited in the majority opinion is a commission of the Brocco case, *supra,* which it cites and does not overrule, and if it be true that the Missouri Compensation Act permits appeal without a motion for new trial, that practice is opposed to the spirit and genius of our practice, which requires a motion for a new trial to review an error which does not appear from the face of the record.

It is therefore my opinion, in which Justice McFaddin concurs, that only errors may be reviewed which are apparent from the face of the record, in the absence of a motion for a new trial, and as none appear on the face of the record, the testimony being no part of the record proper, the appeal should be dismissed.

Opinion delivered October 17, 1949.

[redacted]

E. M. Ditmon, for appellant.

Ike Murry, Attorney General, and *Arnold Adams,* Assistant Attorney General, for appellee.

Frank G. Smith, J. Appellant was found guilty of assault with intent to commit rape. The jury's verdict finding him guilty did not fix his punishment, but left that duty to the trial judge. Section 4070, Pope's Digest, permits this practice and under its authority appellant was given a sentence of four years in the penitentiary. To reverse this judgment appellant assigns three errors in his motion for a new trial; that the verdict of the jury was contrary to law, contrary to the evidence, and that the court erred in giving Instruction No. .....

The testimony shows that immediately before assaulting Mrs. Frisby, the person alleged to have been assaulted, appellant pursued and chased two other ladies, but both eluded him. Mrs. Frisby was not so fortunate. Her testimony was that she was enroute home from a church meeting, about 8:00 p. m., when she saw appellant chasing a lady, who evaded him by running into a

house on the street where she ran. Mrs. Frisby testified that she thought the parties were fighting. When she passed the house into which the lady who was being chased by appellant ran, appellant came down the steps and grabbed her "right down here on my person, low down". He asked Mrs. Frisby to come around the corner with him, and put his hands all over her, knocking her down. She called appellant a dirty black devil, and he disappeared, and she started running to her home. But appellant reappeared in the next block and again grabbed her, throwing her to the ground. Her neck was scratched, her legs skinned and the buttons on her dress torn off. Her false teeth were knocked out of her mouth, and when she screamed appellant ran away. Mrs. Frisby further testified that both times she was attacked she layed or threw her pocketbook where appellant could get it if that was what he was after, but that "he did not want my pocketbook and he did not touch it."

Mrs. Frisby and the woman she saw appellant chasing identified appellant very positively and definitely as their assailant. The testimony supports the finding that the assault made on Mrs. Frisby was with the intent of committing rape.

It was said in the case of Priest v. State, 204 Ark. 490, 163 S. W. 2d 159, that to warrant a conviction of assault with intent to rape it must appear not only that defendant intended to have carnal knowledge of the female alleged to have been assaulted forcibly and against her will, but that he did some overt act toward accomplishment of his purpose which amounted in law to an assault upon her. The testimony here fully meets this requirement.

That Mrs. Frisby was assaulted is not questioned, and that appellant was her assailant was established by the testimony of Mrs. Frisby. There was testimony tending to prove an alibi according to which testimony appellant was not present at the time and place where the assault occurred. The truth of this testimony was of course a question of fact and evidently was not credited by the jury.

The assignment that the court erred in giving Instruction No. ..... is disposed of by the opinion in the case of Page v. State, 181 Ark. 314, 25 S. W. 2d 422, where it was said: "The last assignment that the court erred in giving instructions numbered '.....' to the jury cannot be considered, as it points out no particular instruction, is too general, and is the same as if it had said the court erred in giving instructions." Certainly all the instructions were not erroneous, indeed we find no error in any of them, and appellant does not attempt to show that any of them were erroneous.

The testimony amply supports the verdict, and as no error appears, the judgment must be affirmed and it is so ordered.

LINDSEY *v.* HORNADY.

4-8878 223 S. W. 2d 768

Opinion delivered October 17, 1949.

Rehearing denied November 14, 1949.

T. S. Lovett, Jr., and *G. D. Walker,* for appellant.

George H. Holmes, for appellee.

GEORGE ROSE SMITH, J. This controversy is between rival purchasers of 150 acres of timberland, formerly

owned by the nineteen heirs of T. A. Neely. The chancellor ruled in appellee Hornady's favor in this action to quiet his title to the land. The appellants contend that the chancellor erred in refusing to sustain their claim to an undivided nineteen forty-seconds interest in the property.

The facts are best stated in chronological order. In early July, 1946, both Hornady and the two appellants were negotiating with the Neely heirs for the purchase of this timberland. On July 10 Hornady made an oral contract with four of the heirs, by which he agreed to buy the property for $3,500. This agreement was subject to these conditions: (*a*) That the other adult heirs agree to the sale; (*b*) that Hornady institute probate proceedings for the sale of the interest of the nine minor heirs; (*c*) that Hornady be the successful bidder at the probate sale; and (*d*) that after the conveyance Hornady reconvey the land without the timber to Henry Neely, one of the heirs, for $1,000. Thus in effect the appellee agreed to buy the timber for $2,500, and Henry Neely agreed to buy the land for $1,000.

Hornady prepared a warranty deed to be signed by all the adult heirs. Four of them signed and acknowledged it on July 10. The deed was then left in the custody of a notary public, with the understanding that the other adult heirs would come in and sign it if they agreed to the sale. The notary was not authorized to deliver the deed to the grantee; on the contrary, after every one had signed he was to deliver it to one of the grantors, who was to retain it until the sale was completed and the consideration paid.

On July 20 all the other grantors except Henry Neely called at the notary's office and signed the deed. Thus the matter stood until early in September, when Carl Neely became dissatisfied with what he considered to be the slow progress of the probate proceedings. He borrowed the deed from the notary and in company with appellant Lindsey submitted it to his attorney, T. S. Lovett, Jr., for an opinion as to whether he was bound by his oral agreement with Hornady. Mr. Lovett advised

Neely and Lindsey that the oral contract was unenforceable and that Neely was free to sell to the appellants if he wished. Acting on that advice Carl Neely conveyed his interest to the appellants, who promptly recorded the deed. Between then and September 21 several other Neely heirs also became dissatisfied and sold their interest to appellants. By these deeds the appellants acquired the nineteen forty-seconds interest they now assert.

Hornady was the highest bidder at the probate sale and received the guardian's deed on September 24. In October Henry Neely signed the original deed and it was delivered to Hornady, who then conveyed the land to Henry Neely with a reservation of the timber. Checks for the purchase price were sent to the various heirs, but those who had already sold to the appellants refused to accept the tender. Hornady then brought this action against the appellants to quiet his title and to cancel the deeds to them. By cross-complaint the appellants sought partition.

We think Carl Neely's attorney was right in his view of the law. Although the heirs may have been morally bound by their agreement with Hornady, the statute of frauds rendered the contract unenforceable. The deed itself was the only writing signed by the vendors. To satisfy the requirements of the statute a written memorandum must state the consideration and all other essential terms of the agreement. *St. L., I. M. & S. Ry. Co.* v. *Beidler,* 45 Ark. 17. Here the deed recited a consideration of one dollar and made no mention whatever of those terms of the contract having to do with the probate proceedings and the reconveyance to Henry Neely. It was therefore not sufficient to take the agreement out of the statute.

To avoid the effect of the statute of frauds the appellee contends that there was a valid deposit in escrow or in the alternative that delivery and passage of title took place when the deed was left with the notary. As to the first contention, a deposit in escrow is effective only if the deed passes irrevocably beyond the grantor's con-

trol. *Masters* v. *Clark,* 89 Ark. 191, 116 S. W. 186. Here the notary acted as the grantors' agent in retaining the deed and was instructed to return it to one of the grantors. These facts also answer the alternative contention; for delivery of a deed to the grantor's agent, to be held by him until the purchase money is paid, cannot be treated as a delivery to the grantee. *American Central Fire Ins. Co.* v. *Arndt,* 129 Ark. 309, 195 S. W. 1075.

We conclude that the appellants' assertion of title to an undivided interest in this land must be sustained. The decree is accordingly reversed and the cause remanded.

HOLT, J., dissenting. I respectfully dissent. The great preponderance if not the undisputed testimony, I think, supported the following findings of the Chancellor: "The undisputed evidence in this case definitely establishes the fact that Carl Neeley and eighteen others owning a forty-one forty-second interest in the land described in the complaint executed a warranty deed and delivered it to J. E. Goggans, a Notary Public, of Herbine, Arkansas, with instructions to deliver the same to Mrs. Dallas Neeley Hornady for the plaintiff, L. E. Hornady; further that this deed was to be delivered to L. E. Hornady, the plaintiff, if the one-forty-second interested owner by the minor children of Mrs. Margaret Reep could be sold by the proper order of the Cleveland County Probate Court. This was done, and the sale for the minors' interest in the property involved was expedited as rapidly as possible. The defendants were present at the time of the sale and bid upon this interest in the land."

Appellee fully performed all the conditions in the agreement between him and the Neeley heirs, whereby they agreed to sell and he agreed to purchase the tract of land in question. In accordance with the agreement, a warranty deed conveying the land was prepared and for the convenience of the grantors was left with a third party and the signatures of all the adult heirs were duly signed to the deed of conveyance to appellee.

Two of the conditions were that by proper procedure, an order would be procured from the Probate

Court directing the sale of the minors' interest in the property to appellee. This condition was fully carried out within a period of two and one-half months from the date of the agreement, which was within a reasonable time. No definite time limit was stipulated in the agreement or deed for the completion of the deal. Therefore, only a reasonable time would be required.

"*Where time is not specified.* If a deed is silent as to the time of performance, the law will imply that performance must be within a reasonable time. What constitutes a reasonable time depends on the subject matter, the nature of the act to be performed, and the situation of the parties." 26 C. J. S., Deeds, p. 489, § 152.

It is undisputed that at the probate sale of the minors' property, appellants here were present bidding upon the land and forced appellee to pay much more for the minors' interest than he had agreed to pay the adult heirs. After all parties signed the deed to appellee conveying the property including the minors, Henry Neeley signed the deed in accordance with the agreement and completed the sale. In the circumstances, I think the delivery of the deed to appellee was complete and sufficient to bind all the interested heirs and convey title to appellee as the trial court found.

It is undisputed that the Neeley heirs who executed deeds to appellants in the present case were attempting to convey interests in the property in question which they had some time before duly conveyed by warranty deed to appellee. This they had no right to do without first allowing appellee a reasonable time to carry out the condition of the agreement which he had with them and the other heirs.

"If a deed has been effectively delivered to a third person for the use of the grantee, the grantee has the right to have the deed remain in the possession of the custodian until the happening of the event on which he is entitled to take possession, and a change of intention on the part of the grantor, or the death of the grantor or grantee, will not defeat the delivery." 26 C. J. S., Deeds, p. 244, § 43 c. *Selby* v. *Smith,* 301 Ill. 554, 132 N. E. 109.

"Likewise, a mental reservation contrary to the grantor's expressed intention to convey title, or a subsequent change of intention, does not destroy the effect of a completed delivery. In construing the acts of the parties, in order to ascertain the intent to deliver the instrument, the presumption that the law is known to them must not be disregarded." 26 C. J. S., Deeds, p. 237, § 41.

In *Faulkner* v. *Feazel,* 113 Ark. 289, 168 S. W. 568, this court said: " 'Any disposal of a deed, accompanied by acts, words or circumstances, which clearly indicate that the grantor intends that it shall take effect as a conveyance, is a sufficient delivery. 2 Jones on the Law of Real Property and Conveyancing, §§ 1217-1224, and cases cited.' No particular form of delivery is required. The deed may be manually given by the grantor to the grantee, yet, manual delivery is unnecessary. The real test of delivery is, did the grantor by his acts or words, or both, intend to divest himself of title."

In *Graham* v. *Suddeth,* 97 Ark. 283, 133 S. W. 1033, it is said: "A deed is defined to be a 'written instrument signed, sealed and delivered'; and it is essential to the validity of a deed that there should be a delivery of the instrument. But in order to constitute a sufficient delivery thereof it is not necessary that there should be an actual manual transfer thereof to the grantee or a formal acceptance thereof by him. The question of a delivery of a deed is largely one of intent; and if it clearly appears from the words or acts of the grantor that it was his intention to treat the instrument as his deed and to make a disposal thereof, indicating that it should be effective, then the delivery is sufficient."

A second condition was that appellee would deed the property (except the timber rights) back to one of the adult heirs, Henry Neeley, for a consideration of $1,000 in order that the aged mother of the Neeleys might have a home. This condition, as well as all others, was complied with by appellee within a reasonable time.

The decree should be affirmed.

COCA-COLA BOTTLING COMPANY OF FORT SMITH *v.* HICKS.

4-8885 223 S. W. 2d 762

Opinion delivered October 17, 1949.

Rehearing denied November 14, 1949.

Pryor, Pryor & Dobbs, for appellant.

Charles I. Evans, for appellee.

ROBERT A. LEFLAR, J. While plaintiff (appellee), Mrs. Alta Hicks, was transferring several bottles of Coca-Cola, bottled by defendant, from the original case to an ice box in plaintiff's restaurant at Booneville, the upper part of her foot was severely cut by flying glass from one of the bottles. The evidence differed as to whether the bottle exploded while it was in plaintiff's hand, or was dropped by her on the floor and broke there, or was knocked out of her hand by contact with some other nearby article. Plaintiff's suit against defendant bottler was brought on the theory that the bottle

exploded in her hand because of defendant's negligence in improperly filling, charging, capping or otherwise preparing it. She offered no affirmative evidence, however, to establish such negligence in defendant, though she gave evidence to establish that she was herself not guilty of any contributory negligence, that no independent causes intervened to break the bottle, and that it exploded while she held it in her hand.

After the evidence was completed the defendant requested, and was denied, certain instructions the practical effect of which would have been to direct a verdict for defendant. Under other instructions, the jury returned a verdict for the plaintiff, with damages in the amount of $500, and judgment was entered accordingly. Defendant's appeal is based on the denial of its request for a directed verdict, plus the granting of one instruction for the plaintiff the net effect of which was to allow the case to go to the jury on the negligence issue. No serious argument is made that the award of damages was excessive.

The instructions under which the case was tried were almost entirely offered by the defendant, and were very carefully and accurately phrased so as to call attention to every evidential possibility under which the defendant would not be liable. The jury was told that for the plaintiff to recover she must prove that the defendant was guilty of negligence which was the proximate cause of the injury (Instructions Nos. 2, 6, and 14); that contributory negligence in the plaintiff would bar recovery (Nos. 3 and 5); that if the breaking of the bottle was caused by any act or fact not involving negligence in either plaintiff or defendant the plaintiff could not recover (Nos. 10 and 11); and that inability of the jury to determine from the evidence what caused the bottle to break must result in a verdict for the defendant (No. 12).

In the light of the instructions, the jury must be taken to have determined that the breaking of the bottle, and the resultant injury to plaintiff's foot, were proximately caused not by any negligent act of the plaintiff herself, nor by any non-negligent act of the plaintiff or

anybody else, nor by any unascertained fact or event, but rather by the negligence of the defendant in the course of filling, charging, capping or otherwise preparing the bottle. In reaching that conclusion the minds of the jurors must have gone through a process of reasoning to the effect that since the bottle did explode, and since none of the possible explanations just enumerated were acceptable to them, and since negligence in filling, charging, capping or otherwise preparing the bottle was a reasonable explanation of what had happened, the verdict should be arrived at in accordance with that reasonable explanation.

Counsel for both sides agree that this jury logic was permissible only if the rule of *res ipsa loquitur* is applicable to the facts of the case. We have concluded that it is applicable.

There are statements in the decisions of this State, and other states, that for *res ipsa loquitur* to apply it must be shown that the injury complained of was caused by an agency or instrumentality under the exclusive control and management, at the time of injury, of the one whose liability is asserted. *Southwestern Gas & Electric Co.* v. *Deshazo,* 199 Ark. 1078, 1088, 138 S. W. 2d 397, 402; *Missouri Pac. Rd. Co.* v. *Shores,* 209 Ark. 539, 191 S. W. 2d 580; *Thompson, Trustee* v. *Shores,* 209 Ark. 539, 545, 191 S. W. 2d 580, 583; *Slack* v. *Premier-Pabst Corp.,* 1 Terry (Del.) 97, 5 Atl. 2d 516. Arkansas has never applied this concept to bottles containing carbonated drinks, but some states have. *Stodder* v. *Coca-Cola Bottling Plants, Inc.,* 48 Atl. 2d 622.

Other states have held that when a plaintiff shows that an exploding bottle was handled with due care after it left the control of the defendant, and that the bottle had not been subject to extraneous harmful forces during that time, *res ipsa loquitur* applies. *Macon Coca-Cola Bottling Co.* v. *Crane,* 55 Ga. App. 573, 190 S. E. 879; *Piacun* v. *Louisiana Coca-Cola Bottling Co.,* 33 So. 2d 421 (La. App.); *Stolle* v. *Anheuser-Busch, Inc.,* 307 Mo. 520, 271 S. W. 497, 39 A. L. R. 1001; *Honea* v. *Coca-Cola Bottling Co.,* 143 Tex. 272, 183 S. W. 2d 968, 160 A.L.R.

1445; *Gordon* v. *Aztec Brewing Co.*, 33 Calif. 2d 514, 203 Pac. 2d 522. These cases hold that it is only necessary that the defendant have exclusive control of the factors which apparently have caused the injury, and that the instrumentality may have actually passed out of the possession of the defendant at the time of injury without foreclosing application of the rule. This is on the theory that a sound bottle of carbonated water, or other charged liquid prepared for human consumption, will not burst if carefully handled. If such a bottle containing liquid under pressure does explode, after careful handling, it is probable that the bottler charged it excessively, failed to discover a flaw in the bottle or cap, or was otherwise negligent in preparing it. See *Colyar* v. *Little Rock Bottling Works,* 114 Ark. 140, 169 S. W. 810.

This court, though it has not heretofore had occasion to apply the *res ipsa loquitur* rule to exploding bottled beverages, has applied substantially the same rule in other cases involving negligence of a defendant in preparing or supplying foodstuffs and beverages. Thus in *Drury* v. *Armour & Co.,* 140 Ark. 371, 216 S. W. 40, the plaintiff's wife had died as a result of eating sausages, allegedly poisonous, prepared by the defendant. The court did not apply the *res ipsa loquitur* rule as such to the facts, but said "Appellee's method of slaughtering animals and preparing and packing meat for distribution and sale were matters entirely within the knowledge of its own employees, and the circumstances proved in this case were at least sufficient to make a *prima facie* case and shift to appellee the burden of proving that there was no negligence in this respect." There are other cases, such as *Kroger Grocery & Baking Co.* v. *Melton,* 193 Ark. 494, 102 S. W. 2d 859, where the *prima facie* rule was not applied. These cases are properly distinguishable by the fact that in them the instrumentality causing the injury was not only not in the defendant's possession and control at the time of injury, but was actually susceptible to new and intervening causes which might have acted upon it after it left the defendant's possession, whereas in *Drury* v. *Armour & Co.* the sausage was protected by a covering until consumed, so that the exclu-

siveness of defendant's control over what caused the injury was actually not interfered with until the sausage was cooked and eaten. Similarly, there are numerous cases in which this Court has held that a plaintiff injured by drinking a foreign substance contained in a bottled beverage has a *prima facie* case of negligence against the bottler. *Coca-Cola Bottling Co.* v. *McBride,* 180 Ark. 193, 20 S. W. 2d 862, and *Coca-Cola Bottling Co. of Southeast Arkansas* v. *Spurlin,* 199 Ark. 126, 132 S. W. 2d 828, are typical decisions. In each of these cases the bottled beverage had passed out of the hands of the defendant bottler some time before it was opened and drunk by the injured plaintiff, but there had been no opportunity for any new negligence, intervening to contaminate the contents of the sealed bottle, until the bottle was opened just before the plaintiff drank from it. In other words, there was a practical continuation of the defendant's exclusive control over the contents of the bottle up to the time of the alleged injury.

In the words of Mr. Justice HOLMES, *res ipsa loquitur* is "merely a short way of saying that, so far as the court can see, the jury, from their experience as men of the world, may be warranted in thinking that an accident of this particular kind commonly does not happen except in consequence of negligence, and that therefore there is a presumption of fact, in the absence of explanation or other evidence which the jury believe, that it happened in consequence of negligence in this case." *Graham* v. *Badger,* 164 Mass. 42, 41 N. E. 61. This is the kind of inference that jurors commonly are allowed to make from circumstantial evidence, the only difference being that, when *res ipsa loquitur* applies, the circumstantial evidence from which the inference is drawn is the fact of the injury itself, plus the few obvious facts which surround the injury but do not clearly explain how it happened. See (1940) 8 Univ. of Ark. Law School Bulletin 43. The scope of this permissible inference must be carefully limited to exclude cases where the circumstances of the injury do not tend substantially to prove that negligence in the defendant, and in nobody else, caused the plaintiff's injury. To make certain that the

injury has not been caused by somebody else, through some intervening negligence, it is ordinarily required that the instrumentality causing injury have been in defendant's exclusive possession and control up to the time of the plaintiff's injury. That requirement appears to have been satisfied when the plaintiff shows, as in the instant case, that there was no opportunity for the content or character of the charged bottle to have been changed from the time it left defendant's hands until it exploded.

The Circuit Court's judgment for the plaintiff is affirmed.

The Chief Justice and Mr. Justice FRANK G. SMITH, dissent.

HILDRETH *v.* STATE.

4573 223 S. W. 2d 757

Opinion delivered October 17, 1949.

Rehearing denied November 14, 1949.

Flowers, Trimble & Davis, for appellant.

Ike Murry, Attorney General, and *Jeff Duty,* Assistant Attorney General, for appellee.

GRIFFIN SMITH, Chief Justice. By information filed August 4, 1948, the Prosecuting Attorney for Lee County charged that on August 2d Wesley Hildreth raped a designated female person. The accused appealed from a judgment inflicting the death penalty and procured reversal on the ground that the trial Court erred in refusing to hear testimony relating to his petition for a change of venue. *Hildreth* v. *State,* 214 Ark. 710, 217 S. W. 2d 622.

When the cause was called on remand in April, 1949, the defendant again asked that the venue be changed, resulting in a direction that trial should be in Phillips Circuit Court, at Helena. In appealing, the following statements appear in counsel's brief:

"Appellant, a Negro, was convicted of rape and sentenced to death. The prosecutrix was a young white woman. Appellant did not testify, and no evidence was offered in his behalf. Questions involved are, (1) whether the evidence warrants death where the prosecutrix admits she made no alarm and did not see appellant with any weapon which might produce fear and submission, and (2) whether the Supreme Court may reduce the punishment assessed by a jury".

In support of his plea for substitution of life imprisonment for electrocution, appellant's counsel says: ". . . We wish to emphasize the fact that the consequences of this crime are within the realm of minimum damage to the community and to the prosecutrix".

First—Sufficiency of the Evidence.—The victim of appellant's lust was 21 years of age, married, and the mother of a three-months-old child when the attack occurred at the rural tenant home between Marianna and Helena, three or four miles from the paved highway.

The undisputed evidence is that the prosecutrix was attending to her household duties the morning of August 2d when appellant—whom she had never before seen—entered through an open kitchen door; and, as the witness explained it, "he was standing right in front of me when I first saw him". The baby was sleeping in an adjoining room. Appellant's first question was, "Where is your husband?" Without waiting for an answer, appellant went into the baby's bedroom, looking backward as he walked. The mother, thinking the baby might be in danger, followed. Appellant grabbed her and warned that if she screamed he would kill her. He then said, "Did you ever have a date with a colored man?" When the answer was "No", he remarked, "Well, this is one time you are going to have one". Efforts of the young mother to free herself were unavailing. She was "dragged backward to the bed", where the criminal act was consummated.

In leaving, appellant warned that if the woman told her husband what had occurred "I will return and kill you". Disregarding the threat, the prosecutrix ran perhaps a quarter of a mile to where her husband was working in a cotton field. Several hours later treatment was given by a physician, who verified assertions that force had been used. When arrested, appellant admitted to a deputy sheriff that he "had done it". There was corroborating testimony, with identification.

The jury, believing the injured woman and other witnesses, found that violence through fear prevented outcries, the absence of which is emphasized in urging by inference that there was want of resistance, with tacit consent.

It is difficult to see how any verdict other than one of guilt could have been returned. The fact-finders, through instructions, were told that they could fix punishment at life imprisonment, or death. The members of that body must have read, from the expression and demeanor of witnesses, circumstantial and affirmative conduct which satisfied them beyond a reasonable doubt that the act complained of was beyond the borderline of extenuation.

Second—Supreme Court's Power to Reduce Punishment.—The right to fix punishment is primarily a duty enjoined upon juries. It is only in cases where evidence does not sustain the degree of crime expressed in the verdict, but does support a lower finding, that an appellant's plea for partial relief may be successful.

Third—"Consequences to the Community".—Text writers on criminal law, and court decisions, deal with two classes of crime. Those to which wrong is imputed only because lawmaking bodies have placed them in a forbidden category are spoken of as *mala prohibita;* while acts that are inherently wicked are said to be *mala in se.* In the latter class we find robbery, arson, murder, manslaughter, assault, . . . and rape. Thus, public policy in respect of this most detestable crime found severe expression long before the existence of Arkansas was even remotely contemplated, for in Deuteronomy it was said that "If a man find a betrothed damsel in the field, and the man force her, and lie with her, then the man only that lay with her shall die; but unto the damsel thou shalt do nothing; there is in the damsel no sin worthy of death, . . . for he found her in the field, and the betrothed damsel cried, and there was none to save her."—ch. 22: 25, 26, 27.

Blackstone tells us that the civil law punished ravishment with death and confiscation of goods. Like penalty was exacted by ancient Saxon laws. Gothic or Scandinavian treatment was similar to the Saxon.

It will thus be seen that the death penalty for rape is not a modern innovation, predicated upon race or class consciousness; nor is there to be found in any literature dealing with the law, or with custom, or with social relationships, any support for appellant's proposition that the consequences of rape are negligible to the community and of but minimum importance to the outraged woman.

Affirmed.

GIPSON *v.* INGRAM.

4-8982 223 S. W. 2d 595

Opinion delivered October 17, 1949.

Kenneth C. Coffelt, for appellant.

W. W. Sharp, H. S. Yocum, Ike Murry, Attorney General, and *Arnold Adams,* Assistant Attorney General, for appellee.

Rose, Dobyns, Meek & House, Amici Curiae.

ED. F. MCFADDIN, Justice. This is the so-called "Cash Fund" case. Appellant (plaintiff below) filed proceedings in the Chancery Court, claiming relief as a citizen and taxpayer. The defendants (appellees here) were: the State Comptroller, L. R. Beasley, and other persons as the board members in charge of various state agencies and institutions and their disbursing agents. Some of the institutions are: the University of Arkansas, Henderson State Teachers College, the State Hospital for Nervous Diseases and the State Tuberculosis Sanitorium.[1] We will refer to the State Comptroller as such,

[1] Plaintiff listed defendants as follows: "Mrs. H. B. Ingram, Faber White, Dr. H. King Wade, Ross McDonald and Latane Temple, as the Board of Control and Members of the Board of Control of the Hospital for Nervous Diseases for Arkansas, a public institution; and John C. Black, Fred I. Brown, Dr. Euclid M. Smith, P. E. Murphy, Raymond F. Orr, Herbert Thomas, W. W. Sharp, Wiley T. Jones, Jackson T. Stephens and Henry S. Yocum, Sr., as the Board of Trustees and Members of the Board of Trustees for the University of Arkansas, a public institution; and Herschel Garner, J. W. Sanders, J. T. Cone, J. E. Chism and R. C. Grisson, as the Board of Control and Members of the Board of Control of the Arkansas Boys' Industrial School for Negroes, a public institution; and Charles O. Smithers and W. G. Wofford, as the Disbursing Officers, Business Managers and Directors of Finance for the said Arkansas Hospital for Nervous Diseases and its said Board of Control and its Members hereinabove named; and T. C. Carlson, as the Disbursing Officer, Business Manager and Director of Finance for the University of Arkansas and its said Board of Trustees and its Members hereinabove named; and R. D. Moore, as the Disbursing Officer, Business Manager and Director of Finance for the Arkansas Boys' Industrial School for Negroes, and its said Board of Trustees and its Members, hereinabove named; and L. R. Beasley, as Comptroller for the State of Arkansas."

and to all the other defendants as "state agencies and institutions."

Plaintiff's pleadings allege: (1) that each of the said state agencies and institutions has a cash fund derived from various sources; (2) that all such cash funds are public money and should be deposited immediately in the state treasury and expended only after appropriation acts by the Legislature; (3) that the state agencies and institutions are expending these cash funds as the governing boards see fit, and without legislative appropriation; (4) that the State Comptroller is auditing and not officially disapproving expenditures from the cash funds by the state agencies and institutions, and that the State Comptroller should be restrained from approving vouchers for payment from said cash funds;[2] and (5) that some portions of the said cash funds of some of the state agencies and institutions are being used to supplement the salaries paid employees, so that such employees are in fact receiving compensation greater than the amount fixed by the Legislature.

The prayers of the plaintiff's pleadings were:

". . . that the Court enjoin temporarily and permanently the defendants, and each of them, from appropriating, paying out or in any manner depleting any of such funds herein referred to now in their possession, or that may come into their possession in the future, which have not been appropriated for a specific purpose by an Act of the Arkansas Legislature; and that this Court issue a mandatory injunction against the defendants, and each of them, requiring them to deposit any and all of such funds now in their possession or under their control, or that may come into their possession or under their control, in the treasury of the State of Arkansas; that the State Comptroller, L. R. Beasley, be restrained from approving for payment any voucher of any kind or character whatsoever against any fund of any of the State institutions herein named, known as

[2] Act 63 of 1933 established the system complained of in this case. See also §§ 13-212, *et seq.*, Ark. Stats. (1947) regulating the auditing of cash funds of various state agencies and institutions.

'cash funds' or funds which have not been previously appropriated by the Arkansas Legislature for specific purposes; that the order of the Court herein apply not only to the defendants herein named, but to their successors in office; that defendants, and each of them, be restrained temporarily and permanently from in any manner paying out or in any manner causing to be paid out any of such funds named in this cause for salaries of any officer or employee of any of the institutions or agencies named in this cause, which salaries have not previously been fixed and appropriated by the Legislature, and for any and all other proper relief to which the complainant herein may be entitled in equity."

Answers filed by some of the defendants alleged the corporate status of the state agencies and institutions represented by them, while other answers denied every material allegation of the plaintiff's pleadings. All answers prayed that the proceedings be dismissed. The case was heard on oral evidence, to which we will hereinafter refer. The Chancery Court entered a decree dismissing the complaint; and there is this appeal challenging the correctness of that decree.

There is only one allegation that anything is being done in violation of what the Legislature has permitted, and that allegation is that some portions of the cash funds are being used to supplement the salaries of certain employees, so that such employees are receiving compensation greater than the amounts fixed by the Legislature. This allegation will be discussed in topic II, *infra*. All the other allegations involve the question, whether the Legislature has proceeded in a constitutional manner. That will be discussed in Topic I, *infra*.

I. *The Constitutional Question.* Appellant cites Art. V, § 29 of the Constitution: "No money shall be drawn from the treasury except in pursuance of specific appropriations made by law, the purpose of which shall be distinctly stated in the bill, and the maximum amount which may be drawn shall be specified in dollars and cents; and no appropriations shall be for a longer period than two years.";

and, also, Art. XVI, § 12: "No money shall be paid out of the treasury until the same shall have been appropriated by law, and then only in accordance with said appropriation."

The constitutional provisions, as above quoted, refer to "the treasury." The case of Straub v. Gordon, 27 Ark. 625[3] holds that "the treasury" means the *state* treasury. So the constitutional language "no money shall be paid out of (drawn from) the treasury . . ." necessarily refers only to money that has reached the *state* treasury, and does not refer to money held elsewhere.

Appellant urges that all the money received by the various state agencies and institutions[4] should be paid into the state treasury, and that the Legislature is without power to authorize otherwise. It is shown by the proof that many, if not all, of the state agencies and institutions involved in this suit have cash funds—derived from such sources as students' fees, sale of farm produce, dormitory charges, etc.—held by said institutions and agencies either under express legislative permission or under circumstances known to the Legislature and not prohibited by it. It was also shown that no part of the cash funds of any of the state agencies and institutions is derived from taxes, but, rather, from the operation of such state agencies and institutions. So, for

[3] *Straub* v. *Gordon* involved a provision of the Arkansas Constitution of 1868. The opinion was delivered in 1872, so the definition of "treasury" had been judicially determined before those words were employed in our present Constitution of 1874.

[4] The complaint lists the following cash funds: "Land Department; Barber Examiners Board; Licensing Board General Contractors; Labor Department, Boiler Inspection Division; Employment Security Division; Public Service Commission; Revenue Department; State Plant Board; Resources and Development Commission; State Hospital; Tuberculosis Sanatorium; McRae Memorial Sanatorium; Confederate Home; White Boys' Industrial School; Arkansas Girls Training School; Health Department; Board of Cosmetology; Livestock Sanitary Board; Arkansas Merit System Council; University of Arkansas Medical School; University Extension Service; State Teachers College; Henderson State Teachers College; Arkansas State College, Jonesboro; Arkansas Polytechnic College; A. and M. College, Magnolia; A. and M. College, Monticello; A. M. and N. College, Pine Bluff; Junior Agricultural College; Education Department; Vocational Education; Library Commission; School for the Blind; School for the Deaf; Supreme Court Library; Vocational Training School, Clinton; Vocational Training School, Huntsville; War Memorial Stadium Commission; and Educational Department Surplus Property."

purposes of this topic "cash funds" are those received by the state agencies and institutions from sources other than taxes, as the term "taxes" is ordinarily used.

The question is, whether the Constitution of Arkansas requires that all such cash funds be deposited into the state treasury. If it does, then the appellant is correct on this point; if it does not, then he is in error. In determining the answer to the posed question, we emphasize that the Legislature, as the supreme law-making body, possesses all legislative powers except those expressly or impliedly prohibited by the Constitution. State v. Ashley, 1 Ark. 513; Straub v. Gordon, 27 Ark. 625; Bush v. Martineau, 174 Ark. 214, 295 S. W. 9.[5] So we examine the Constitution to see if the Legislature is prohibited from allowing the state agencies and institutions to have and disburse cash funds.

It will be observed that both in Art. V, § 29 and Art. XVI, § 12, as previously copied, it is required that no money shall be drawn from the treasury until the same shall have been duly appropriated. There is no

[5] This Court used the following language in this opinion, all of which is apropos to the case at bar: "Before proceeding to a discussion of the issues raised by this appeal, we deem it proper to premise our remarks by two fundamental rules of construction announced and adhered to throughout the history of this court. First, that the Constitution of this State is not a grant of enumerated powers to the Legislature, not an enabling, but a restraining act (*Straub* v. *Gordon,* 27 Ark. 625), and that the Legislature may rightfully exercise its powers subject only to the limitations and restrictions of the Constitution of the United States and of the State of Arkansas. *St. L. I. M. & S. Ry. Co.* v. *State,* 99 Ark. 1, 136 S. W. 938; *Vance* v. *Austell,* 45 Ark. 400; *Carson* v. *St. Francis Levee Dist.,* 59 Ark. 513, 27 S. W. 590; *Butler* v. *Board, etc.,* 99 Ark. 100, 137 S. W. 251. In other words, as was said in *McClure* v. *Topf & Wright,* 112 Ark. 342, 166 S. W. 174: 'It is not to be doubted that the Legislature has the power to make the written laws of the State, unless it is expressly, or by necessary implication, prohibited from so doing by the Constitution, and the act assailed must be plainly at variance with the Constitution before the court will so declare it.' Second, that an act of the Legislature is presumed to be constitutional, and will not be held by the courts to be unconstitutional unless there is a clear incompatibility between the act and the Constitution; and further, that all doubt on the question must be resolved in favor of the act. *State* v. *Ashley,* 1 Ark. 513-552; *Eason* v. *State,* 11 Ark. 481; *Dabbs* v. *State,* 39 Ark. 353, 43 Am. Rep. 275; *Sallee* v. *Dalton,* 138 Ark. 549, 213 S. W. 762; and in *Standard Oil Co. of La.* v. *Brodie,* 153 Ark. 114, 239 S. W. 753, this court quoted the language of the Supreme Court of the U. S. in *Hooper* v. *California,* 155 U. S. 657, 15 S. Ct. 207, 39 L. Ed. 297, that 'the elementary rule is that every reasonable construction must be resorted to in order to save the statute from unconstitutionality.'"

language in our present Constitution which requires that all of the public money shall be paid into the state treasury. Such a provision exists in the Constitutions of some States, but not in our present Constitution. For instance, in the Arkansas Constitution of 1868 there was a provision (Art. X, § 17) which read: "The general assembly shall tax all privileges, . . . and the amount thus raised shall be paid into the treasury."[6]

Likewise, the 1875 Constitution of Missouri provides in Art. IV, § 43: "All revenue collected and all moneys received by the State from any source whatsoever shall go into the treasury, . . ."

In the 1902 Constitution of Virginia, § 186, there is this language: "All taxes, licenses and other revenue of the State shall be collected by its proper officers and paid into the state treasury. No money shall be paid out of the state treasury except in pursuance of appropriations made by law; . . ."

It will be observed that in the quoted provisions from these Constitutions there is the requirement of deposit into the treasury. But when these Constitutions are compared with the present Arkansas Constitution (of 1874), it is clear that our present Constitution requires only that money in the treasury shall not be removed except by legislative appropriation. There is no requirement in the present Arkansas Constitution that all public money shall be paid into the state treasury. The absence of such a provision from our present Constitution appears to have been a studied and deliberate omission. Certainly, such omission leaves the Legislature of this State free to provide that public money derived as in this case may be deposited as cash funds, for use by the state agencies and institutions.

To buttress the conclusion reached, we point out that Art. VI, § 22 of our present Constitution provides that the State Treasurer: " . . . shall perform such duties as may be prescribed by law."

[6] This constitutional provision was involved in the case of *Straub* v. *Gordon*, 27 Ark. 625 (decided in 1872).

Thus the Constitution clearly empowers the Legislature to decide whether the State Treasurer shall be required to receive all state funds. This Art. VI, § 22 of our present Constitution was so worded in light of the fact then existing that the Revised Statutes of 1836 (Chap. 18, § 22) prescribed the Treasurer's duties: "To receive and keep all monies of the State not expressly required by law to be kept by some other person . . ."[7]

The conclusion is inescapable that the Constitution of 1874 empowered the Legislature to state what money should be paid into the state treasury.

It was conceded by appellees in the oral argument that all the cash funds of the state agencies and institutions are public moneys. The Legislature could require that all these funds be paid into the state treasury, and the Legislature could require that none of these funds be expended without appropriation by the Legislature. But the question here is not what the Legislature might do with these funds. The question is whether the Constitution requires that all these moneys be paid into the state treasury. We find no such provision. To that extent the appellant is in error in this case.

II. *Use of Cash Funds to Supplement Salaries.* Some of the legislative appropriation acts for the state agencies and institutions by express language have limited the salaries of various employees to amounts not in excess of those expressed. The proof in this case shows that, notwithstanding such restrictive language, some of the state agencies and institutions have used some of the cash funds to supplement such salaries, with the result that some employees are receiving salaries greater than those fixed by the Legislature, as aforesaid. This is an illegal procedure, and the appellant is entitled to have an injunction against such procedure. Art. XVI, § 4 of the Constitution of Arkansas says: ". . . and the number and salaries of the clerks and employees of different departments of the State shall be fixed by law."

[7] Chap. 18, § 22 of the Revised Statutes of 1836 is now § 5526, Pope's Digest and § 12-609, Ark. Stats. of 1947. See *Newton* v. *State*, 33 Ark. 276.

One illustration suffices to make clear our holding. By Act 169 of 1949 the Legislature made appropriation for the maintenance and operation of the University of Arkansas for the biennial period ending June 30, 1951. Section 1 of the Act reads in part:

"There is hereby established for the University of Arkansas the maximum number of officials and employees necessary for the maintenance and operation of said department, *and the maximum rates of salaries for said officials and employees;*[8] and there is hereby appropriated, to be payable from the University of Arkansas fund, for said salaries and other purposes, as set out herein, the following:

Maximum Annual
Salary Rate

. . . . . .

"14. Salary of 30 staff members, not to exceed per year each.....$4,800.00".[9]

Thus by this Act the Legislature has prescribed the maximum salary[10] that may be received from the public funds; and it is illegal for any state agency or institution to use a portion of its cash fund (which is public money, as previously stated) to increase the salary fixed by the Legislature.

It was conceded by the appellant in the oral argument that authority of the Legislature to fix compensation in excess of the constitutional limitation is not presented in this case.[11] Neither are we here concerned with the sufficiency or insufficiency of the language in the said appropriation act quoted,[12] nor the question of a "line-by-line" appropriation.[13] We are concerned here only with the fact that in some instances it has been

[8] Italics our own.

[9] The proof did not relate to this particular item. We have used it merely to illustrate the situation.

[10] In *Humphrey* v. *Wyatt,* 188 Ark. 676, 67 S. W. 2d 209, we discussed the fixing of salaries. Concerning "extra compensation," see Art. V, § 27 of the Constitution.

[11] See Art. XIX, § 23 of the Constitution.

[12] See Art. V, §§ 29 and 30 of the Constitution.

[13] See Art. XVI, § 4 of the Constitution.

shown that the maximum annual salary as limited in the appropriation act has been supplemented with money from the cash fund. We hold that when the Legislature fixes the maximum annual salary of an employee, then no state agency or institution may use any part of its cash fund to supplement or enlarge the salary so fixed by the Legislature, and the State Comptroller should disapprove any expenditure from such cash fund of any amount to any employee, if such expenditure results in the employee's thereby receiving a greater salary than fixed by the Legislature, and the state agency or institution so offending should be enjoined from paying out cash funds that accomplish such result.

In this connection, we point out that some employees (for example, see § 17-517 Ark. Stats. of 1947) receive additional compensation derived from federal as well as county sources, and some also from endowments or gifts. The legislative determination in the appropriation act of a maximum annual salary does not prohibit such supplementation from funds from such other sources, as these are not "cash funds" within the purview of this topic. No injunction should prohibit the supplementation of salaries by the use of funds given for salary purposes by sources not controlled by the Legislature, such as private donations and federal grants. Of course, the agencies and institutions may accept donations earmarked for salaries, even though they may not use general cash funds to increase the salaries fixed by the Legislature.

Therefore we reverse only that part of the decree which dismissed the portion of plaintiff's complaint covered by this topic II of this opinion; and we remand the cause on this Topic II, to the Chancery Court, to enter a decree in accordance with this opinion. In all other respects the decree of the Chancery Court is affirmed.

LEFLAR, J., disqualified and not participating.

GRIFFIN SMITH, Chief Justice, (dissenting). This is the first time since 1836, and the only time during the

75 years of rule under the Constitution of 1874, that there has been judicial affirmation of the proposition that a public fund belonging to the people in their governmental capacity may be dealt with by boards, commissions, institutions and agencies under a plan giving to them unrestricted authority to act with complete indifference to the public treasury, absent the formality of appropriation.

No appellate court, in similar circumstances, has made a more far-reaching determination—nor one so fanciful and better adapted to extravagant expediency.

To say that after the lawmaking power has created an agency with the right in it, either express or implied, to collect an appreciable part of the state's money, and that this agency may in turn disburse it at its will for salaries, wages, commodities, travel expense, and multitudinous incidentals in respect of which the legislature has intentionally or through inadvertence withheld formal sanction, and to hold that any such public money not actually deposited in the treasury or earmarked by an Act for that department is an asset subject to the discretionary use of those who have been appointed, selected, elected or employed, — these mere statements and the liberality of opinion that christen their birth are, to say the least of it, novel to the point of seeming incredibility.

We must therefore turn to the assigned reason upon which the innovation rests for a guiding rule. We must see whether a rule of construction applied by the Court's majority, or the interpretation of constitutional language, finds support in precedent or sanction in reality.

It is pertinent that we ascertain whether *that* reason comports with the dignity of purpose, the clarity of expression, and the penetrating vision attending deliberations of Grandison D. Royston as president, and other delegates to the constitutional convention. We are permitted to inquire if meaning given to Articles devoted to revenues, and to Sections on expenditures, carries into effect with practical certainty the thought of our founding fathers in creating within the government three co-

ördinate departments: the legislative to say by express enactment from what sources money should come and how spent; the executive to collect and apply this revenue when affirmatively authorized by appropriations to do so; and the judicial, when conflict arises, to adjudge whether either department has transgressed the inherent rights of the other, or trespassed upon its sanctions.

It is said that interpretation differs from construction in that the former is the art of ascertaining the true sense of any form of words; that is, the sense which their author sought to convey. Construction, on the other hand, is the drawing of conclusions as to subjects that lie beyond direct expressions of the text. Thus conclusions are reached which are in the spirit, though not in the letter, of the text. Construction comes when there is contradiction in different parts of the same writing, or conflict between terms used in separate documents that should be read together.[1]

The majority's citation to *Straub & Lohman* v. *Gordon,* 27 Ark. 625, does not add to or detract from the issues presented here. The decision was under the Constitution of 1868, and it merely held that when the general assembly was told to tax all useless privileges, pursuits, and occupations, and directed that the money *should be paid into the treasury,* the sheriff who held the fund should remit to Little Rock, and not to Phillips County.

But, say the participating Judges, since "treasury" means *state,* and since, by the organic law of 1874, no money may be drawn except by appropriation, this language *"necessarily refers only to money that has reached the state treasury, and does not refer to money held elsewhere."*

The corollary is implicit, under this construction, that if public funds have not actually reached the treasurer, and the general assembly has not legislated with reference to their use, expenditure may be lawfully made without the formality of appropriation.

[1] See Cooley's Constitutional Limitations, 8th Ed., ch. 4, 223 S. W. 2d 38½.

Cash Fund money comes, in some instances, from fees authorized by law, but with no express provision for handling it. In other cases the agency assesses under its self-asserted implied power of discretion. Millions pass through administrators who act independently of legislation, relying upon usage for approval.

The record does not suggest that those drawn into the controversy are dishonest in exercising this so-called privilege; nor does the writer here intend to create a suspicion that irregularity of a personal nature is practiced. The contrary appears to be true. For example, the Supreme Court itself is one of the defendants. Filing fees are deposited in a local bank and drawn by check for library purposes. But the fact that this has been done under unofficial judicial sanction for nearly a century does not make it legal. On the contrary, it serves to emphasize the fruits of prolonged legislative procrastination, and the unwholesome consequences that can follow.

I think one effect of today's opinion is to say that the state treasurer, whose constitutional status in the executive department was provided for by § 1 of Art. 6, has *permissive* duties only, and that responsibility does not begin until affirmative requirements have been legislatively prescribed. If Cash Funds are public moneys, as the opinion concedes, and if there is no requirement that "*public money*" must pass into the treasury, and if, as the opinion points out, the absence of such mandate ". . . [*was*] *a studied and deliberate omission*" from the Constitution,—then certainly, if these conclusions of the Court's majority are sound, the general assembly is left to its own devices in avoiding other parts of the Constitution. For example, maximum official salaries are fixed by § 23, Art. 19, at $5,000. Reasonable persons will concede that under existing conditions, and with constantly increasing duties, many public officials whose compensation has not been increased through constitutional amendment are deplorably underpaid. Others serve under statutory authority, and at least *prima facie* they cannot be paid more than the maximum fixed in

1874. But today's opinion points a way to better pay through *failure* of the general assembly to fix these salaries, or by repealing those already fixed. It may, by negative or affirmative action, permit all fees and commissions to be withheld from the treasury.

By wiping out statutes fixing salaries of the several agencies, such as the Commissioner of Education, Penitentiary Superintendent, Commissioner of Insurance, Bank Commissioner, and may others similarly situated, administrators or supervising boards especially created for that purpose could fix all salaries not constitutionally set, name the number of employees, apportion their compensation—and, by and large, handle the state's undeposited money in any manner not expressly prohibited. While money arising from excise and ad valorem taxes and assessments is not discussed in the opinion, yet the decision at least inferentially draws within its scope all funds that for any cause other than legislative action may be found outside of the treasury.

I do not assume that the lawmaking body will undertake to exercise its full power within this fertile field of finance. The presumption should be that it will not lend an attentive ear to the entreaties from pressure groups, however indefinite the Constitution may be said to be.

Most writers agree with Judge Cooley in his assertion that a principal share of the benefit expected from written constitutions would be lost if the rules they established were so flexible as to bend to circumstances or be modified by public opinion. "It is with special reference to the varying moods of public opinion", says he, "and with a view of putting the fundamentals of government beyond their control, that these instruments are framed; and there can be no such steady and imperceptible change in their rules as inhères in the principles of the common law. These beneficent maxims of the common law which guard person and property have grown and expanded until they mean vastly more to us than they did to our ancestors, and are more minute, particular, and pervading in their protections. . . .

Public sentiment and action affect such changes, and the courts recognize them; but a court or legislature which would allow a change in public sentiment to influence it in giving to a written constitution a construction not warranted by the intention of the founders would be justly chargeable with . . . disregard of public duty; and if its course should become a precedent, these instruments would be of little avail. The voice of public passion is quite as likely to be in the direction of oppression as in any other; and the necessity for bills of right in our fundamental laws lies mainly in the danger that the legislature will be influenced, by temporary excitement and passions among the people, to adopt oppressive enactments. . . . The object of construction, as applied to a written constitution, *is to give effect to the intent of the people in adopting it.*''

If I could agree with my five associates—who with all the certitude of crystal discernment ascribe ''studied and deliberate purposes'' to the omission of phrases so obviously implied; if I could believe that the people of this state, in adopting their Constitution, intended that public money should not, without legislative command, find its way to the only official repository created for that purpose, or that agencies inferior in dignity to the departments so carefully established could by failure to deposit nullify the genius of a harmonious purpose; if I could feel that the makers jockied with a joker, but did the work so cleverly that for three-quarters of a century the subtle transaction was not openly suspected,—then, with these assurances, a concurrence might be possible. But, convinced as I am that the delegates of 1874 had attained that mature intellectual stature their handiwork suggests, and that nothing was farther from their thoughts than today's eventuality, I must respectfully dissent.

WISINGER *v.* STEWART.

4-8924 223 S. W. 2d 604

Opinion delivered October 17, 1949.

Ed E. Ashbaugh, for appellant.

McKay, McKay & Anderson, for appellee.

LEFLAR, J. Appellant Wisinger applied to the Arkansas Public Service Commission for a certificate authorizing him to operate a motor transport line for hauling heavy oil field equipment over certain named highways, with headquarters at El Dorado. At the hearing, Wisinger's evidence indicated the inadequacy of existing motor transport service of this type. Opponents gave evidence tending to show that existent services were adequate. The Public Service Commission's order found the facts to be in accordance with the evidence given by Wisinger, and a certificate was issued permitting him to operate, for the purpose stated, over the highways designated, which included highways throughout the entire South Arkansas oil fields and adjacent areas. On appeal to the Circuit Court, the holding was that there was ample evidence to sustain the finding that public convenience and necessity required an additional carrier in the vicinity of El Dorado, but that there was insufficient evidence to show such need at any place "other than El Dorado, Arkansas, and the immediate vicinity thereof," and the case was remanded to the Commission with instructions to ascertain and fix the area covered by "the immediate vicinity" of El Dorado. Wisinger appeals from that part of the Circuit Court's judgment which would thus limit the area covered by his certificate. No cross-appeal has been taken, by the opponents of the application, from that part of the Circuit Court judgment which affirmed the granting of the certificate for highways in El Dorado and its immediate vicinity.

The only question here, then, is as to the propriety of the Circuit Court judgment insofar as it in part set aside the Commission's order. Analysis of the evidence received in the case has convinced us that the Commission's original order should be reinstated.

The statute which prescribes the scope of judicial review of orders of the Public Service Commission is Act 124 of 1921, the relevant parts of which appear in Ark. Stats. (1947), §§ 73-133 and 73-134. These sections governed judicial review of orders of the old Railroad Commission. By Act 12 of 1933 the functions of the Railroad Commission were transferred to the newly created Corporation Commission, but the scope of appeal (Act 12 of 1933, § 9) remained unchanged. Act 324 of 1935 set up the Department of Public Utilities within the Commission, and prescribed a different scope of appeal from its orders, Ark. Stats. (1947), § 73-233, but made no change in the law governing other appeals. Then Act 40 of 1945 abolished both the Corporation Commission and the Department of Public Utilities, combining the two agencies as the present Public Service Commission. The Act of 1945, however, made no change in the existent law as to judicial review. Fortunately or unfortunately, the law was left in the situation of providing one rule for review of orders issued in cases jurisdiction over which was inherited by the new Commission from the Department of Public Utilities, and another rule for cases the jurisdiction in which was inherited from the old Corporation Commission and the Railroad Commission. (For a study of this entire matter, see the Comment on Judicial Review of Findings of the Arkansas Public Service Commission in 2 Ark. L. Rev. 67.)

The guiding principles of judicial review applicable to appeals such as this one have been stated several times. They are:

"A. This court tries this case *de novo,* and renders such judgment as appears to be warranted and required by the testimony. . . .

"B. The general rule is that a certificate may not be granted where there is existing service in operation over the route applied for, unless the service is inadequate, or additional service would benefit the general public, or unless the existing carrier has been given an opportunity to furnish such additional service as may be required." *Santee* v. *Brady,* 209 Ark. 224, 227, 189

S. W. 2d 907, 909; quoted in *Arkansas Motor Freight Lines* v. *Batesville Truck Line,* 214 Ark. 448, 216 S. W. 2d 857.

C. ". . . it must be remembered that we are dealing with the finding of a tribunal erected by the Legislature for the special purpose of investigating and determining matters of the nature here involved; and the finding of such a tribunal on a fact situation may not be upset by the courts unless the finding is clearly against the weight of the testimony." *Arkansas Express, Inc.* v. *Columbia Motor Transport Co.,* 212 Ark. 1, 7, 205 S. W. 2d 716, 719.

A point not to be lost sight of here is that *de novo* review by the courts, including this Court, must not proceed as though the Public Service Commission did not exist and had never held a hearing. A hearing has been held, and the Commission which held the hearing has had the advantage of seeing and hearing the parties and witnesses face to face, whereas the Circuit Court and this Court review the evidence from the record only. "Where a matter is heard and decided by an administrative body such as the Public Service Commission, an order made by it should be upheld by the court on appeal unless it is against the weight of the evidence." *Camden Transit Co.* v. *Owen,* 209 Ark. 861, 863, 192 S. W. 2d 757, 758. "We try cases of this kind *de novo,* but it is the duty of the courts to accord due deference to the finding of the Commission, since it is the agency upon which the General Assembly has placed the duty to investigate and determine, in the first instance, the need for any proposed motor carrier service." *Schulte* v. *Southern Bus Lines,* 211 Ark. 200, 202, 199 S. W. 2d 742, 743. *Accord: Motor Truck Transfer, Inc.* v. *Southwestern Transportation Co.,* 197 Ark. 346, 122 S. W. 2d 471.

The first case to come up under the judicial review sections of Act 124 of 1921 was *St. Louis Southwestern Ry. Co.* v. *Stewart,* 150 Ark. 586, 235 S. W. 1003, decided in 1921, and McCulloch, C. J., there said: "The statutes of the State lodged (that) power, primarily, in the

. . . Commission, and it was not the purpose, we conceive, of the framers of the statute in allowing an appeal to substitute the judgment of the courts, unless it appears that an error was made by the Commission in its conclusions."

In another recent case the following language was used: ". . . the statute . . . required this court, upon the appeal to it, to hear the matter *de novo,* and to render such judgment upon appeal as appeared to be warranted and required by the testimony. And so we do, but we cannot ignore the fact appearing in the record before us that a protracted hearing was had, both before the Commission and in the Circuit Court on appeal, and, while the burden was on petitioners to make the affirmative showing that the public convenience and necessity required the issuance of the permit, that finding has been made, and should now be affirmed unless it appears to be contrary to a preponderance of the testimony. We hear chancery appeals *de novo,* but, when we have done so, we affirm the findings of the chancellor on questions of fact unless his findings appear to be contrary to a preponderance of the evidence." *Potashnick Truck Service* v. *Missouri & Arkansas Transportation Co.,* 203 Ark. 506, 508, 157 S. W. 2d 512, 514; quoted in *Southeast Arkansas Freight Lines* v. *Arkansas Corporation Commission,* 204 Ark. 1023, 166 S. W. 2d 262.

This Court's proper task, in the light of this state of the law, is to inquire whether the determination of the Commission was contrary to the weight of the evidence. As already indicated, we have found that it is not.

Applicant Wisinger's witness, M. F. Gathright, a rig building contractor, testified that he operated in an area running 75 or 80 miles from El Dorado, that his work required heavy equipment to be hauled not only in and around El Dorado but "from one field to another," "and sometimes from other states," that other operators lacked adequate equipment for handling his work, that there had been delays in rendition of service by other operators, that applicant Wisinger had been employed

by other operators to do work which they were unable to attend to for their customers, and that he and others had need of applicant's services in the oil field areas in which they worked.

Another witness, J. B. Cunningham, testified to the same general effect as to the need for the service, and that "Our business is all spread (out) . . . throughout the oil fields in Southeastern Arkansas." C. R. Douthitt testified that he needed applicant's services, and that he was "operating in Union, Ouachita, and Columbia counties." H. N. McClatchey testified similarly, and that he served oil fields in Union, Ouachita and Columbia counties, "and farther than that, if they want it, all over the Arkansas fields." J. E. Cox testified that he needed applicant's services, and that "I cover the oil fields in South Arkansas and part of North Louisiana." Three of the opponents' own witnesses, G. W. Benefield, Rodney Stewart, and J. E. Purkins, testified in terms of operations outside Union County.

This affirmative testimony was sufficient to justify the Commission in concluding that the oil fields of South Arkansas constitute an inter-related unit in respect to the matters involved in this application, and that the application should be granted for the entire territory constituting that inter-related unit.

The order of the Commission included authority to operate on some highways outside the oil fields altogether. The relevance of these highways to oil field operations is not clear, but it suffices now to point out that the certificate of public convenience and necessity permits the applicant to move only oil field equipment over the designated highways, and none of the opponents has shown that the certificate, insofar as it relates to these off-the-field highways, will in any way interfere with his business.

The judgment of the Circuit Court is reversed, and the order of the Public Service Commission is reinstated as originally entered.

HARP *v.* CHRISTIAN.

4-8949 223 S. W. 2d 778

Opinion delivered October 24, 1949.

[redacted]

Len Jones, for appellant.

A. B. Arbaugh and *Merle Shouse,* for appellee.

MINOR W. MILLWEE, Justice. Appellant, Silas Harp, homesteaded an 80 acre tract of land about 1907 which he still occupies as a farm. The land is described as the W ½ of the SW ¼ of section 15, township 17 north, range 21 west. He included within his fences about 30 acres that was not a part of his homestead, but was instead a part of the adjoining section 16 and was commonly referred to as "School Lands." The record title to section 16 has been held as a unit by successive owners, the last of whom is the appellee, C. R. Christian, who purchased the land from Mamie M. Pratt in 1946. After purchasing the property, *appellee made claim* to the 30 acre tract in controversy, whereupon appellant filed his petition in chancery court to quiet his title based on a claim of adverse possession. Appellee intervened in the suit denying the allegations of the petition and asking that his own title to the lands be quieted. Trial resulted in a decree dismissing appellant's complaint and confirmation of title in appellee as against appellant.

The only question for determination is whether the chancellor's finding that appellant's possession of the

lands in controversy was permissive, and not adverse, is against the preponderance of the evidence.

It is admitted that appellant has had the 30 acre tract under fence and been in actual possession of it for more than seven years. He has paid no taxes on the land and taxes on the whole of section 16 have been paid by appellee and his predecessors in title. Several witnesses testified on behalf of appellee that appellant had told them over the years that he was not claiming the land in controversy as his own, but was merely holding and using it for the benefit of the owners and looking after it for what he could get out of it. There was also evidence that appellant had offered to purchase the property from the record owners on different occasions.

Appellant admitted that he tried to buy it from appellee to clear his title and avoid a law suit, but denied that he offered to purchase from others. Previous record owners of section 16 from 1930 to 1946 testified that appellant made no claim of ownership of the lands in question, but was using it by permission of said owners. Mrs. Mamie Pratt, who owned the 16th section from 1939 to 1946, testified that appellant recognized her ownership at all times and offered to trade another piece of property for the land in controversy and witness advised him that he could use the land until she was ready to transfer it or use it herself. Appellee testified that in buying the land he relied upon appellant's statement that he was looking after the land for the use of it and did not own it.

Appellant denied the statements attributed to him by witnesses for appellee and stated that some of them were mad at him. He further testified that he always claimed and used the lands as his own without recognition of the rights of others and thought it was a part of the lands he homesteaded. Several witnesses for appellant testified that they had never heard anyone question his ownership or possession during the long period of years that he held and used the lands.

At the time appellant took possession, the land was school property and if the testimony of appellee's wit-

nesses is to be credited, appellant acknowledged it as such and his use thereof was permissive. It is well settled that where entry upon land is permissive, the statute will not begin to run against the legal owner until an adverse holding is declared and notice of such change is brought to the knowledge of the owner. Fulcher v. Dierks Lumber & Coal Co., 164 Ark. 261, 261 S. W. 645; Gibbs v. Pace, 207 Ark. 199, 179 S. W. 2d 690. It is true that an offer to purchase will not divest a title that has already become vested in the adverse claimant, but such testimony may be considered in determining the character of the possession during the statutory period. Baughman v. Foresee, 211 Ark. 149, 199 S. W. 2d 596.

While the evidence is sharply conflicting, we cannot say that the preponderance thereof does not support the conclusion of the chancellor that the possession of appellant was permissive and not adverse. The decree is accordingly affirmed.

GARRETT *v.* MUSGRAVE.

4-8935 223 S. W. 2d 779

Opinion delivered October 24, 1949.

Abe Collins and *J. F. Quillin,* for appellant.

Shaw & Spencer, for appellee.

GRIFFIN SMITH, Chief Justice. The appeal results from a disagreement between adjoining landowners regarding the use of a well, but in determining relative rights the Chancellor established a true line. Effect was to quiet title in appellees to a strip thirteen feet wide on the west side of Lot 10, and to create in the disputants a common tenancy in respect of the well as such.[1]

Prior to 1944 J. P. and Hazel Turner owned Lot 10. By deed of August 28th of that year they conveyed to Harold Sandlin the west thirteen feet. A description note of explanation was: "This thirteen-ft. [strip] is supposed to run a line in the center of the well now located on Lot No. 10." The deed was filed for record December 7.

By deed of December 7, 1944, the Turners sold to Robert and Lucy Wilkinson "Lots 10, 11, and 12," of Block 7. This deed was recorded December 15th.

On March 13, 1945, the Sandlins delivered to Beuna Garrett their deed conveying ". . . the west thirteen feet of Lot 10." Following the description, within parentheses, this notation appears: "The thirteen-ft. [strip] is supposed to run in a line in the center of the well now located on said Lot 10."

It will be seen that when Turner sold to Sandlin, and when Sandlin sold to appellant, the center of the well was thought to be the boundary. Emphasizing this supposition, Robert and Lucy Wilkinson sold to appellees only thirty-seven feet of Lot 10 when on November 17th they transferred Lots 11 and 12 to her.

Litigation began in December, 1948, when Mrs. Garrett procured from Polk County Court an injunction restraining the Musgraves from using the well.[2] The de-

[1] The true description is Lot 10, Block 7, of the Original Town of Hatfield, Arkansas.

[2] Constitution, art. 7, § 37; 3 Ark. Stats. (1947), §§ 22-435, 32-104.

fendants there were also directed to remove copper piping that had been installed in connection with the proposed mechanical pumping. In dissolving the injunction and awarding to appellant that part of Lot 10 "from the center of the well west," and to appellees "that part from the well's center east," each was given the right of use without interference from the other. There was an express finding that the installation had in no sense contaminated the water, and that its use would not interfere with appellant's requirements.

The Chancellor was warranted in finding that appellant knew of the deed presumptions or suppositions when she acquired the thirteen-ft. strip. Effect of Mrs. Garrett's testimony relating to the rights of others is that, after the deed had been prepared and a check in payment written, but before it was cashed, she ascertained the material facts. In her testimony Mrs. Garrett said, "I had paid over the money [before the information was received"], but she immediately added, "I had written the check." Sandlin, she explained, told her the well was being jointly used. This mutuality continued until appellees undertook to install the pump.

There was testimony that the well had been in use for approximately forty years, and without exception adjoining proprietors had drawn water under a claim of right, each conceding to the other a like privilege.

One of the appellees testified that when ditch-digging was under way preparatory to putting in the pump, Mrs. Garrett objected, but readily agreed that the dividing line was "through the well." This, she said, was reflected by the deed.

For the purpose of determining how long the well, as an established boundary monument, had been looked to, the Court permitted Sandlin to testify that he had owned the Garrett place, and that Turner had owned the Musgrave property. Turner, said Sandlin was going to sell, ". . . so I propositioned him about buying

half of the well. There had been a partition fence between the places".[3]

An early discussion of the extent to which descriptions by metes and bounds will be considered when in conflict with natural monuments or landmarks, is to be found in the opinion of Chief Justice Watkins, *Phelps* v. *Henry & Cunningham,* 15 Ark. 297. The principle he expressed, and one generally accepted, is that quantity must yield to course and distance in surveys, and that course and distance shall yield to natural objects or artificial monuments where quantity is not material; but where land is laid off into compact town lots, then quantity is an object of prime importance, and when the survey is according to a regular plan, it is expected that purchasers will buy with reference to it. See *Cooper* v. *Woods,* 194 Ark. 1155, 110 S. W. 2d 701; *Davis* v. *Strong,* 208 Ark. 254, 186 S. W. 2d 776.

The controlling consideration is that if buyer and seller, who are familiar with real property, deal with reference to particular things and places they have seen, it must be presumed that these natural objects were of paramount importance, otherwise they would not have contracted with reference to them.

Although in the case at bar town lots and parts are involved, the testimony of all of the interested witnesses shows that the well was an essential. It was the principal objective to which all turned, hence the conclusion is inescapable that no one had in mind the value of a few feet of land other than as a means of reaching the well.

Affirmed.

[3] Further testimony by Sandlin in regard to the line was: "When Turner and I got out there we found a 'place' as close as we could to what we thought was the old fence between the two places. We 'took off' thirteen feet, and that was supposed to be the old line between—the center of the well. I put up a corner post. I believe Mrs. Garrett has a hedge that grows up to the well. In other words, the fence comes right to the center of the well. When I sold [Mrs. Garrett] the place Clyde Farmer came down and asked what I wanted for it, and I told him what I would take. When I went out to the car to go home, *they* said they would buy, and I told them that afternoon that half of the well belonged to her. I bought the extra strip. I first had a lot and a half, then I bought that to get the well."

4-8893 223 S. W. 2d 776

Opinion delivered October 24, 1949.

C. T. Cotham, for appellant.

Otis H. Nixon, for appellee.

ED. F. MCFADDIN, Justice. This is an appeal by the wife from a chancery decree granting her husband a divorce on the ground of indignities. A careful study of the record discloses that the husband did not offer evidence of *any specific acts of indignities;* so the decree must be reversed because of the insufficiency of the evidence. This opinion could well stop at this juncture, except for the fact that we are reversing the Chancery Court, and therefore feel constrained to discuss the evidence and the controlling authorities in order to clarify the result that we have reached.

This suit was filed in September, 1946, at a time when the plaintiff (appellee), Charles Smith, was in Italy in the Armed Forces of the United States. It appears that the plaintiff completed one enlistment in the Army in the fall of 1945, and re-enlisted in the spring of 1946. The complaint alleged that the parties separated on December 1, 1945 "because the defendant was guilty of such indignities towards him as to render his condition in life intolerable, in that she treated him with rudeness, contempt, studied neglect and open insult, habitually and systematically pursued."

The plaintiff's deposition was taken before a Commissioned Officer of the U. S. Army (inferentially in Italy) on December 9, 1946. The only portion of the plaintiff's testimony even remotely bearing on the cause of the separation is as follows:

"Q. When did you and the defendant separate? A. We separated about the first day of December, 1945. Q. Where did the separation take place? A. The separation took place in Hot Springs, Arkansas. Q. What was the cause of the separation? A. She nagged and fussed at me all the time, and claimed that she had tuberculosis, a fact I knew nothing about; and when I was discharged from the Army I found her in fine shape and was unable to get along with her at all. She seemed to be interested only in getting all the money she could out of me. . . . Q. Was her conduct such as to render your condition in life intolerable? A. It certainly was."
Thus the plaintiff's testimony was a mere generalization, without detailing any specific facts to support the alleged grounds for divorce.

The only other witness for the plaintiff was his mother, a lady 71 years of age and a resident of Mississippi, whose testimony was in the form of a deposition taken in December, 1947. She testified that in *May*, 1945, she went to Hot Springs to visit her daughter-in-law, and that on such visit she observed that a man called "Happy" came to see the defendant (appellant); and that "Happy" and the defendant went driving in a car. The foregoing is the only specific evidence by this witness seeking to cast any reflection on the defendant; and this evidence related to an incident alleged to have occurred more than six months before the separation, and not even claimed by the plaintiff to have been the cause of the separation.

We have repeatedly held in divorce cases that proof must be made of specific acts and conduct showing the indignities relied on in order that the court may properly determine whether the proof is sufficient to support the claimed ground for divorce;[1] that testimony which

[1] *Walldren* v. *Walldren*, 187 Ark. 1077, 63 S. W. 2d 845.

amounts to no more than mere inference and conclusions of the witness should be rejected;[2] and that a decree will not be granted upon the uncorroborated testimony of one of the parties.[3] In Settles v. Settles, 210 Ark. 242, 195 S.W. 2d 59 we reiterated the holdings as to the quantum and quantity of the evidence essential to obtain a divorce decree on the ground of indignities. Appellee's evidence in the case at bar does not measure up to the requirements of our holdings.

Furthermore, the facts here are strikingly similar to the facts in the Waldren case,[4] for here, as in that case, the plaintiff wrote to his wife after the separation; and such letters show that the plaintiff's desire to be relieved of his marital vows, was not because of defendant's fault, but because the plaintiff wanted to be "free." While in Italy, the plaintiff wrote the defendant several letters, one of them reading in part:

"I think I owe you some kind of explanation of my reasons for wanting the divorce. I hope you take this the right way, as I am now laying all my cards on the table and doing something I have never needed to do before, asking for a chance at happiness. Not only asking but begging. First, as you know, I have never been satisfied with anything in my life. I can't help this, I'm just built that way. But now I have or rather want something that I am very much satisfied with and that is this girl in Florence. She means more to me than my life. I love her with every ounce of heart, body and soul. If I can't have her, I don't care what happens; and right now I am at the point of doing something drastic. This is why I'm asking you to either get a divorce, or do not oppose the suit I have started. I am begging for this, Joe, not only begging for a divorce but my life also. Never before in my life have I written a letter like this, but never before have I felt the same way I am feeling now."

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[2] *Dunn* v. *Dunn*, 114 Ark. 516, 170 S. W. 234.

[3] *Alston* v. *Alston*, 189 Ark. 525, 74 S. W. 2d 239.

[4] *Walldren* v. *Walldren*, 187 Ark. 1077, 63 S. W. 2d 845.

As before stated, there is in this record no evidence that the plaintiff had grounds for divorce: rather, he wanted a divorce in order that he might marry another.

The decree of the Chancery Court is reversed, and cause is remanded.

POLLOCK *v.* MCALESTER FUEL COMPANY.

4-8946 223 S. W. 2d 813

Opinion delivered October 24, 1949.

Armistead, Rector & Armistead, for appellant.

Keith & Clegg, for appellee.

LEFLAR, J. Appellant William M. Pollock, Jr., owned an undivided one-half interest in the oil, gas and other minerals on a certain 20-acre tract in Ouachita County, Arkansas. The owner of the other un-

divided one-half interest had leased it to appellee McAlester Fuel Company, and the Company was desirous of leasing Pollock's half also, so that it could drill on the whole tract as a unit. After considerable negotiations between the parties and their representatives, an instrument called an "Oil and Gas Lease" was executed by them under date of July 21, 1947, covering "an undivided one-half (½) interest in and to [lands described] containing 20 acres, more or less, and 10 acres if divided." Actually this instrument was not executed until about November 1, 1947, though the earlier date was used because the parties had reached their agreement some months earlier and the final lease as executed was a replacement for others which had previously been executed with inaccurate language. In fact, a well had already been drilled and oil discovered on the land before the final execution of the lease.

A single paragraph in the lease gives rise to the present controversy. That paragraph is typewritten near the end of the printed form, and reads as follows:

"The lessors herein expressly reserve unto themselves, their heirs or assigns, an undivided 1/16 of 7/8 of the total oil and gas and other minerals produced, saved and marketed under the terms of this lease, to be delivered to the lessors free of cost in tanks or pipelines to which lessee, their heirs, successors, or assigns, may connect wells, said interest being what is commonly known as 'over-riding royalty interest.' "

The lessor Pollock claimed that he was entitled under this paragraph to 1/16 of 7/8 of all the oil produced from the entire 20 acres, whereas the Company claimed that he was entitled only to 1/16 of 7/8 of the oil produced from the undivided one-half thereof conveyed by his lease. The present bill in equity was brought by the Company and certain others identified in interest with it against Pollock and his wife for the purpose of quieting in the plaintiff lessee the interests in the oil claimed by the lessee. The Pollocks answered and cross-complained, asking for comparable relief. After hearing evidence as to what the parties did and

said and wrote to each other prior to execution of the final lease, and as to the oil field meaning of the terms contained in the lease itself, the Chancellor found in accordance with plaintiff lessee's contentions, holding that the lessor Pollock was entitled to receive under the "over-riding royalty" clause only 1/16 of 7/8 of the oil produced from his half interest in the land, and quieting the lessee Company's title to the balance of the oil accordingly. From this decree the Pollocks appeal.

The best guide to interpretation of terms used in any instrument is the ordinary meaning of the words themselves, in their own context. Sometimes there is no standard meaning, and sometimes special usages may be shown to prove that the terms are not used in the usual sense in which they are ordinarily employed in the English language as locally spoken and written. But it is useful in any event to ascertain the ordinary meaning of the words themselves, in the proper context of the whole instrument of which they are a part.

Here, the lease by its express terms conveyed "an undivided one-half (½) interest in and to" the oil on a described piece of land "containing 20 acres more or less, and 10 acres if divided." Then the clause in question reserved to the lessors 1/16 of 7/8 of the oil produced "under the terms of this lease." It did not reserve that fraction of all the oil produced "on the land to which this lease relates" or "on the premises described by this lease," but only "under the terms of this lease." And "this lease" by its express terms was a lease of a half interest in the 20 acres, not a lease of the whole of the 20 acres. It could not have been a lease on the whole 20 acres, because the lessor owned and made it clear that he owned only a half interest. It did not purport to be a lease of anything except the lessor's half interest.

Another paragraph in the same lease, as far as its wording is concerned, might equally support the lessor's contention. This is the regular royalty clause, which reads:

"FIRST: To deliver to the credit of lessor, free of cost in tanks or pipe line to which lessee may connect his wells, the equal one-eighth (1/8) part of all oil produced and saved from the leased premises."

This clause must be read in the light of and along with another clause which appears in the same lease. This is the so-called "reduction clause":

"If said lessor owns a less interest in the above described land than the entire and undivided fee simple mineral estate therein, then the royalties and rentals herein provided shall be paid the lessor only in proportion which lessor's fee simple mineral interests therein bears to the whole and undivided fee simple mineral estate in the lands."

When these two clauses appear together in a lease, no one would contend that the regular royalty clause gives the lessor more than 1/8 of the oil produced from the half interest which he leased to the Company. This is standard language regularly used in oil leases to give the lessor a 1/8 interest in the oil produced under the interest conveyed by his lease, and it is so understood in the industry and by the courts. See Summers, The Law of Oil and Gas (1938) § 590; Thornton, The Law of Oil and Gas (Willis Ed., 1932) § 366. Yet if the reasoning employed by the lessor in this case were applied to the standard royalty clause it would give the lessor a regular royalty of 1/8 of all the oil produced on the whole 20 acres. He does not claim this, as of course he could not.

If it were necessary here to go beyond the plain meaning of the terms used in the "over-riding royalty" clause itself, this "reduction clause" would afford an indication of the sense in which the terms were used. It is enough to say now, without determining how far it might or might not be controlling, that as a key to interpretation it leads to the same conclusion that we reach from reading the words themselves.

No Arkansas case has ever passed on the question of interpretation raised by the present case. The lessor

relies principally upon Texas decisions to sustain his position. The oldest and best known of the Texas cases, among those dealing with problems substantially comparable, is *Hooks* v. *Neill,* 21 S.W. 2d 532 (Tex. Civ. App.), which involved a conveyance of a half interest in certain land, with reservation to the grantors of "a one thirty-second part of all oil on and under the said land and premises herein described and conveyed." The holding was that this reserved to the grantor only 1/32 of the oil produced from his half interest, since the half interest constituted the "premises herein described *and conveyed*" by the deed. The lessor in his argument denies that *Hooks* v. *Neill* is similar to the present case, and points out that it has been distinguished in later Texas cases. The first of these later cases is *King* v. *First National Bank,* 144 Tex. 583, 192 S.W. 2d 260, 163 A.L.R. 1128. In this case Duncan and King were the joint owners in fee simple of certain land. Duncan conveyed his half interest therein to King, reserving however a certain fraction of the royalty interest in oil and gas that should be produced "from the hereinabove described land." The Texas court held that King's reservation was of the designated fraction of the oil produced "from the described land," and not just from the half interest conveyed by King. That was what the deed said in so many words, and the court pointed out that there was no conflict between the two cases. In each case the reservation clause in the deed was given effect according to its terms. The terms were different. The most recent Texas case is *R. Lacy, Inc.,* v. *Jarrett,* 214 S.W. 2d 692 (Tex. Civ. App.), in which *Hooks* v. *Neill* was again distinguished, but not overruled. In this latest case the reservation, by a grantor owning only a part interest in the land, was of a certain fraction of the oil "produced *from the land* described in this lease," and the court held that the reservation entitled him to the designated fraction of the oil produced from all the land which the lease described, and not just from his part interest in it. Here again the court did no more than discover and apply the plain meaning of the words used in the lease.

We feel that the Texas decisions are in accord with the interpretation which the Chancellor gave to the Pollock lease. Reservations, if made, may be worded as the parties please. If they provide that the grantor shall have a named fraction of the oil produced on all of the described land, that is one thing; if they provide that he shall have a fraction of what is produced from the interest conveyed by the particular lease, it is another thing. The courts will enforce either agreement as made. For other cases which have dealt with similar problems of interpretation in a similar manner, see Mitchell v. Brown, 43 Calif. App. 2d 217, 110 Pac. 2d 456; Reynaud v. Bullock, 195 La. 86, 196 So. 29.

Apart from the language of the lease itself, appellant bases his interpretation of the "over-riding royalty" clause upon parol evidence which was admitted by the Chancellor in the trial below. This evidence consisted of a series of letters and conversations which preceded the execution of the lease in its final form. In part it explained the preparation and rejection of earlier drafts of the lease. Appellant contends that this evidence tends to show an understanding by the parties, or at least by the appellant Pollock, that the clause was to be so written as to give him 1/16 of 7/8 of the oil produced on all the land, and not just 1/16 of 7/8 of that produced under his lease of a half interest.

The basic principles applicable to the relevancy and use of such extrinsic evidence are well established. Williston, speaking of evidence as to previous negotiations between the parties; says: "Such negotiations, however, may be logically relevant for two purposes, the second of which is legally permissible, though the first is not: (1) to prove an actual intent of the parties at variance with the words of the writing when those words are given their appropriate local meaning; and, (2) to prove the meaning of the written words not by showing that the parties intended them to mean something different from what other persons at the same time and place and dealing with the same subject matter would attach to them, but to prove that the parties were dealing in regard to a matter or to secure an ob-

ject, or under circumstances where local usage would give a particular meaning to the language; or in case the local meaning is ambiguous, to show that the parties attached one appropriate meaning to their words, rather than another equally appropriate meaning." 3 Williston on Contracts (1936) § 630. And in *Magness* v. *Madden,* 212 Ark. 646, 207 S.W. 2d 714, this Court, quoting from the early case of *Haney* v. *Caldwell,* 35 Ark. 156, said: "As a general rule, oral evidence is not admissible to contradict or vary the terms of a valid written contract. . . . But if a contract is not certainly intelligible by itself, extrinsic testimony is admissible to show the intention of the parties, . . . In all such cases the extrinsic testimony is not admitted to prove what the parties to the instrument may have secretly intended; or to add to, take from, change, vary, contradict, or modify; but to find out what is the meaning of the written words they have used, and the true sense thereof as they used them."

We have examined all the extrinsic evidence offered, and are unable to discover wherein it sustains appellant's contention. The most revealing part of this evidence is that which came from the period when the parties were actually arriving at their agreement, as distinguished from that which described their jockeying over words to be included in the writing after they had already reached an agreement for a lease, commenced drilling and finally produced oil on the land.

Under the date of June 27, 1947, Pollock wrote the following letter to appellee's representative:

"Dear Sir:

"On April 28th and May 17th, I wrote you advising that I would not accept your offer for my undivided 20 acre interest in [land described] and advised you that if you were not interested in buying my 10 acre interest for $100 an acre and 1/16th override, I could make a deal with another firm, whereby I could get the override and the $100 an acre.

"Please let me hear from you as to whether or not your company is interested and, if not, I would like to

affect and make a partition with you, permitting and allowing you to take your choice of the 10 acre tract. . . .

"Yours very truly,

"W.M. Pollock, Jr."

Substantially the same language appeared in an earlier letter from Pollock to appellee's same representative, under date of May 17, 1947. Previously, and at about this time, appellee had been offering Pollock only $50 an acre for his 10 acres, and no overriding royalty whatever, but only the regular 1/8 royalty. The letter just quoted indicated quite clearly that Pollock wanted a 1/16 overriding royalty on "my 10 acre interest," which of course was the same for his purposes as an undivided half interest in the 20 acres. It was in the nature of an offer for a contract.

Apparently some conversation followed after this. At any rate, Pollock a few days later received a reply dated July 7, 1947, from appellee's representative. The significant portions of it are quoted:

"Dear Mr. Pollock:

"I am enclosing herewith lease with the 1/16 override and also draft in the sum of $1,000 covering lease interest owned by you . . . [this lease form did not correctly describe the land, and was apparently destroyed. It was not offered in evidence.]

"After talking with you the other day I took the matter up with Mr. Lawton and he advised me to proceed with meeting your requirements in getting the outstanding interests. . . .

"Yours very truly,

"W.A.G. Woodward."

There is ample reason to believe that the "requirements" which the Company's representative was to "proceed with meeting" were those set out in Pollock's letters of June 27 and May 17, 1947. So understood, the extrinsic evidence supports rather than negatives

the interpretation which derives from the language of the lease read by itself.

The decree of the Chancellor is affirmed.

MITCHAM *v.* TEMPLE.

4-8927 223 S. W. 2d 817

Opinion delivered October 24, 1949.

Walter L. Brown, for appellant.

Shackleford & Shackleford, for appellee.

GRIFFIN SMITH, Chief Justice. The litigation presents a question of fact: Whether property to which the appellant had a record title had been appropriated by appellees and held long enough to sustain the plea of adverse possession.

Highway No. 82 in Union County extends east and west where the northeast corner of Section 31 and the northwest corner of Section 32 are common—just beyond the El Dorado city limits toward Magnolia. South of the highway in Section 32 a strip of land 30 feet wide and 210 feet long was retained by Mitcham when he sold lots east of it in 1937.

February 18, 1937, Carl and Rachael Lawrence executed to Joe and Agnes Temple their deed to a lot described by measurements, the east side being 208.71 feet along the line of Section 31. Under this deed all of the Temple property was west of Section 32. These proprietors went into possession February 24, 1937.

In 1945 Mitcham, by letter of August 27th, complained that a hedge and fence maintained by the Temples were east of the true boundary. The original suit in ejectment was transferred to equity, where the Chancellor found that the area in controversy was so situated in 1937 when the Temples entered under the Lawrence deed that, in the light of subsequent conduct, hostile possession of a full-length strip 14 feet wide on the south end and 17.30 at the north had ripened into title.

As a predicate for his decree the Chancellor made written findings in the form of an opinion. He mentioned appellant's testimony that as early as 1944 complaint was made to Joe Temple. The Chancellor personally inspected the property, took note of the condition of hedge and fence, and used this information (presumptively procured by consent of the parties) as aid to a better understanding of what the witnesses had testified to. This, of course, was permissible when so limited. From all of the facts, and the physical conditions observed,—such, for instance, as the size of the hedge as indicative of age, and its alignment with the partial fence farther south—it was determined that the questioned possession had been adverse for more than seven years before 1944.

We are unable to say that these findings are not supported by a preponderance of the evidence; hence the decree must be affirmed.

BAKER *v.* STATE.

4574 223 S. W. 2d 809

Opinion delivered October 24, 1949.

Rehearing denied November 21, 1949.

Northcutt & Northcutt and *H. J. Denton,* for appellant.

Ike Murry, Attorney General, and *Arnold Adams,* Assistant Attorney General, for appellee.

Ed. F. McFaddin, Justice. The appellant, Mrs. Canna Baker, was tried upon an information charging her with "treating a dead body indecently." The State claims that this is an offense at common law. From a conviction and fine of $100 there is this appeal, presenting the issues now to be decided.

I. *Sufficiency of the Evidence.* Giving the evidence for the State its strongest probative value,[1] the following facts are reflected: Ed White was an aged an infirm man drawing old age assistance from the State, which came as a check for $30 dated the first day of each month. With the consent of the county welfare worker, Mrs. Canna Baker provided room, board and personal attention for Ed White, and in return therefor he endorsed and delivered to her his monthly welfare check. Mrs. Baker also cared for several other persons under similar arrangements. Ed White lived in a small cabin on Mrs. Baker's premises a short distance from her home. His welfare check dated December 1, 1948, was received by Mrs. Baker on December 2nd, and—bearing his purported mark—was cashed by her at a local store that afternoon. About 9:00 the night of December 2nd Mrs. Baker reported to the funeral home the death of Ed White. The funeral director, his assistant and two medical doctors examined the body of Ed White, and testified that on December 2nd he had been dead at least five days. Decomposition and other ghastly conditions of the body had occurred.

The State's theory was that Ed White died on November 27th, and that Mrs. Baker kept his body until she received the welfare check on December 2nd; because it was shown that the welfare check dated December 1st would not have been delivered if his death had been known. Mrs. Baker and her witnesses testified that Ed White was alive as late as 3:00 p. m. December 2nd. One witness testified that he saw Ed White sitting in a chair on December 1st. Another witness testified that he saw Ed White seated on the step of his cabin on December 1st, but did not hear him speak or see him move.

We conclude that there was sufficient evidence to take the case to the jury on the question of when Ed White died. If he died on November 27th as contended by the State, then certainly Mrs. Baker kept his body until December 2nd and did not report his death. The

[1] This is the well-established rule in appeals by the defendant in criminal cases. See cases collected in West's Arkansas Digest, "Criminal Law," § 1144(13).

various positions of his body on December 1st would tend to show the handling and exposing of a dead body.

II. *The Offense.* It is strenuously insisted that no offense was committed by Mrs. Baker, even if the facts were as previously detailed. We hold that there was an offense committed. This is a prosecution under the common law,[2] and the text writers and adjudicated cases state that such an offense exists at common law.

In 17 C. J. 1148, in discussing offenses against dead bodies, this appears: "At common law it was an offense to treat the dead human body indecently, and various specific offenses were recognized. Ordinarily it is a misdemeanor for one upon whom the duty is imposed of having a dead body buried to refuse or neglect to perform such duty."[3]

Wharton's Criminal Law, 12th Ed., Vol. II, § 1704, says: "Indecency in treatment of a dead human body is an offense at common law, as an insult to public decency. Hence it is indictable to expose such a body without proper burial; . . ."

See, also, Clark and Marshall on the Law of Crimes, § 473; McClain on Criminal Law, Vol. II, § 1165; and Odgers on The Common Law of England, 2nd Ed., Vol. I, p. 16. For adjudicated cases stating the common law, and in accordance with the texts previously quoted, see: Kanavan's case, 1 Maine 226; *Finley* v. *Atlantic Transport Co.,* 220 N. Y. 249, 115 N. E. 715, L. R. A. 1917E, 852 Ann. Cas. 1917D, 726; *State* v. *Bradbury,* 136 Me. 347, 9 Atl. 2d 657; *Rader* v. *Davis,* 154 Ia. 306, 134 N. E. 849, 38 L. R. A. N. S. 131, Ann. Cas. 1914A; and *Thompson* v. *State,* 105 Tenn. 177, 58 S. W. 213.[4]

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[2] In *State* v. *Phillips Petro. Co.,* 212 Ark. 530, 206 S. W. 2d 771, we said: "In ascertaining the common law, we not only look to our own cases, but we revert to the early English cases, and the early writers on the common law, such as Blackstone, Kent and Bracton. Cases from other American States are also persuasive as to what was the common law."

[3] See, also, 25 C.J.S. 1035.

[4] We have three Arkansas cases involving dead bodies, being: *Security Bank* v. *Costen,* 169 Ark. 173, 273 S. W. 705; *St. L. S. W. Ry. Co.* v. *White,* 192 Ark. 350, 91 S. W. 2d 277; and *Teasley* v. *Thompson,* 204 Ark. 959, 165 S. W. 2d 940; but these cases have no direct bearing on the questions now involved.

An interesting case is that of *Queen* v. *Francis Scott,* Queen's Bench Reports, Vol. II, Adolphus & Ellis, New Series, p. 659; 42 English Common Law Reports 659. In that case Scott, the jailor, held the body of the deceased prisoner, Henry Foster, and refused to surrender it for proper burial until paid some claimed demand. The court held that the jailor was liable to prosecution. So, here, the jury could reasonably have concluded from the evidence that Mrs. Baker held the body of Ed White and had it placed in positions simulating life until she received the welfare check on December 2nd. The county welfare worker testified (and Mrs. Baker did not deny) that Mrs. Baker knew it was her duty to report Ed White's illness or death to the county welfare worker, and that no such notification was given by Mrs. Baker.

Mrs. Baker was not tried for failure to provide burial for Ed White, because the Circuit Court (possibly relying on § 83-308, Ark. Stats of 1947) instructed the jury that Mrs. Baker was relieved from the common law burden of providing burial. Yet the lifting of that burden by statute (if applicable here) left all the more in force on Mrs. Baker, as the caretaker of White, the duty to promptly report his death to the proper authorities. We conclude that the jury was justified in finding Mrs. Baker guilty of committing the common law offense with which she was charged.

Section 1-101, Ark. Stats. of 1947 shows that we have adopted the common law; and under § 41-107, Ark. Stats. the penalty for common law offenses is prescribed. We have other cases wherein common law offenses have been held punishable in the absence of specifically applicable statutes. See *Powell* v. *State,* 133 Ark. 477, 203 S. W. 25, and see the other cases collected and cited following §§ 1-101 and 41-107, Ark. Stats. of 1947.

III. *Other Assignments of Error.* We have examined these, and find them to be without merit:

(a) Mrs. Baker was arrested on April 18th, and was arraigned on May 2nd, so we cannot say that the trial court abused its discretion in overruling the motion for

continuance filed on May 4th, which was the date of the trial. See *Willis* v. *State,* 212 Ark. 403, 206 S. W. 2d 3.

(b) At the time of the arrest, there was no endorsement on the information giving the names of the witnesses for the State; and defendant, in claiming such omission to be fatal, cites § 43-1004, Ark. Stats. of 1947. Assuming—without deciding—that such provision is applicable to informations, nevertheless, the requirement is merely directory. *Cole* v. *State,* 156 Ark. 9, 245 S. W. 303. The names of the witnesses for the State were furnished to defendant in open court on May 2nd, which was the date the defendant sought such information; and under such circumstances, no prejudice was shown to have been suffered by the defendant.

(c) The defendant requested an instruction on reasonable doubt; but insofar as the requested instruction was correct it was covered by the State's instructions Nos. 1, 2 and 8. The trial court is not required to repeat instructions on the same point. *Farr* v. *State,* 99 Ark. 134, 137 S. W. 563. See, also, West's Arkansas Digest, "Criminal Law," §§ 806(1) and 829(1).

(d) The refusal of the trial court to delay the trial for the arrival of the defendant's unsubpoenaed witness was not error. No sufficient diligence was shown. See *Willis* v. *State,* 212 Ark. 403, 206 S. W. 2d 3. Furthermore, the evidence of the desired witness (as stated by defendant's counsel) would have been merely cumulative. See *Pate* v. *State,* 206 Ark. 693, 177 S. W. 2d 933. The defendant had already subpoenaed six witnesses under § 43-2001, Ark. Stats. of 1947, and these six witnesses were present.

(e) The defendant cannot successfully complain of the failure of the Court to instruct the jury on circumstantial evidence, since the defendant did not present to the court any requested instruction. *Cooley* v. *State,* 213 Ark. 503, 211 S. W. 2d 114.

(f) The defendant complains of the refusal of the Court to allow her witness, Mrs. McClure, to answer this

question concerning Mrs. Canna Baker: "During all that time has she ever reported dead bodies . . . ?"

It appears that the purpose of the evidence was to show Mrs. Baker's good character by some specific prior act. For such purpose, the testimony was inadmissible. *Shuffield* v. *State,* 120 Ark. 458, 179 S. W. 650. But regardless of the purpose of the testimony, the record fails to show what Mrs. McClure's answer would have been to the question; and until the offer to prove was definite to that extent, then there is no basis for assignment of error. *Hugus* v. *Sanders,* 164 Ark. 385, 261 S. W. 899; *Kane* v. *Carper,* 206 Ark. 674, 177 S. W. 2d 41.

Finding no error prejudicial to the defendant, the judgment is affirmed.

LOLLAR *v.* STATE.

4576 223 S. W. 2d 801

Opinion delivered October 24, 1949.

Rehearing denied November 21, 1949.

John C. Sheffield, for appellant.

Ike Murry, Attorney General and *Arnold Adams,* Assistant Attorney General, for appellee.

HOLT, J. A jury found appellant guilty of grand larceny, and assessed his punishment at three years in the State Penitentiary. From the judgment is this appeal.

Abraham Hill, a youth 17 years of age, who was jointly charged and tried with appellant was acquitted.

For reversal, appellant, in effect, contends (1) that the evidence was not sufficient to support the verdict of guilty, and (2) that the court erred in refusing appellant's motion for a directed verdict of not guilty, at the close of the State's evidence.

The instructions were not questioned.

(1)

Briefly stated, the evidence on the part of the State tended to show that on November 29, 1948, J. P. Hall, a farmer, purchased a watch from a jeweler in Helena for $178.50. The jeweler testified that it was a 17-Jewel Hamilton Watch, "with a solid gold case and ten diamonds on it." Mr. Hall kept the watch in the glove compartment of his car at various times. On the night before Christmas, 1948, he put the watch in the compartment and locked it, and about noon the next day, took the watch out, looked at it, and replaced it in the compartment. That afternoon, about 2:30, Mr. Hall picked up appellant who remained in the car on the front seat with Mr. Hall for about one-half hour and then appellant left the car. Lollar, who was 19 years of age, had a criminal record, having been charged with delinquency in Louisiana and having served part of a three year sentence for car theft in the Booneville Reformatory in Missouri. Mr. Hall was drinking on Christmas day and at various times had other people in his car. Late in the afternoon of that day, Hall missed the watch, suspected appellant, and began a search for him. December 28th, the Chief of Police at Marianna received a telephone call from the Hobbs' Hardware Store in that city informing him that two boys, later identified as appellant and his associate, Hill, were in the store trying to pawn a watch for $50. When the Police Chief arrived at the hardware store,

the two boys had gone to Harrington's Drug Store, where they again tried to pawn the watch. It was here that the boys were arrested and turned over to the authorities,—the watch being in appellant's possession.

Appellant's explanation of his possession of the watch was that he had won it in a "crap game" from an unidentified Mexican. Hill, his associate, testified that they went to Marianna to dispose of the watch because they were not known in that city. He further testified that appellant, Lollar, admitted to him that he had stolen the watch from Mr. Hall's car. Hill was asked: "Didn't he (meaning appellant) tell you the details about getting it out of that car when he was sitting in there taking a drink? A. Yes, sir. Q. He told you he stole it, didn't he? A. Yes, sir. Q. You know now that you are getting yourself in the penitentiary because you told that? A. I figure it, yes, sir."

The above testimony was ample to warrant the jury in finding appellant guilty. It is undisputed that appellant and Hill had the watch in their possession when arrested. Appellant's attempt to explain possession of the watch by claiming that he had procured it from an unidentified Mexican presented a jury question.

"Possession of property recently stolen justifies the inference that the possession is a guilty possession, and may be of controlling weight, unless explained by circumstances or accounted for in some way consistent with innocence. We have repeatedly held that the recent possession of stolen property by the defendant unexplained, when taken in connection with other circumstances . . . is sufficient to warrant a verdict of guilty. Indeed, the recent possession of stolen property by the accused, unexplained, warrants the jury in returning a verdict of guilty. McDonald v. State, 165 Ark. 411, 264 S. W. 961, and cases cited." *Dennis* v. *State,* 169 Ark. 505, 275 S.W. 739.

(2)

The trial court did not err in refusing appellant's request for a directed verdict at the close of the State's

testimony. We said in the recent case of *McDougal* v. *State,* 202 Ark. 936, 154 S.W. 2d 810: "If the evidence was sufficient to convict appellant then the trial court committed no error in refusing to direct a verdict. In the recent case of Graham and Seaman v. State, 197 Ark. 50, 121 S.W. 2d 892, we said: 'It is true that at the end of the testimony for the state appellants asked the court for a directed verdict of not guilty. If, however, the evidence was sufficient to sustain the verdict of the jury, and we hold it was, of course, there was no error in refusing to give this instruction.' "

Here, as above noted, the evidence on the part of the State was sufficient to support the verdict.

Accordingly, the judgment is affirmed.

GENERAL AMERICAN LIFE INSURANCE CO. *v.* COX.

4-8931 223 S. W. 2d 775

Opinion delivered October 24, 1949.

David Solomon, Jr., for appellant.

Dinning & Dinning, for appellee.

George Rose Smith, J. On March 24, 1930, the Missouri State Life Insurance Company obtained a foreclosure decree that resulted in a deficiency judgment against the appellees. The judgment was assigned to the appellant in 1933. The question now is whether it has been kept in force by revivorship proceedings.

The facts are stipulated. A writ of scire facias was issued and served in June, 1939—less than ten years after the entry of the judgment. The right to revive was not contested, but the order of revivor was not entered until November 23, 1942. Thereafter the judgment was again revived in 1945, without resistance by the appellees. In 1948 the appellees filed their complaint under Ark. Stats. (1947), § 29-506, seeking to vacate the two judgments of revivor. The chancellor held that the court had been without power to revive the original judgment more than ten years after its rendition. Upon this premise he vacated both judgments of revivor; the judgment creditor appeals.

Among other defenses the appellant asserted: (*a*) that if the writ of scire facias is issued within the ten-year period the order of revivor may be entered after its expiration; and (*b*) that the 1945 judgment is res judicata as to any defenses that might then have been interposed. Both contentions are well taken.

I. The ten-year period of limitation is fixed by Ark. Stats. (1947), § 29-601, reading in part: "No scire facias to revive a judgment shall be issued but within ten years from the date of the rendition of the judgment . . ." The statute refers only to the issuance of the writ, not to the entry of the order of revivor. By its terms it grants the full period of ten years within which the writ may issue. To require that the judgment also be taken within ten years would have the effect of reducing the time allowed for issuance of the writ, since provision is made for the filing of an answer and for a hearing upon the question of revivor. Unless a statute of limitation expressly provides otherwise, its operation is ordinarily

tolled by the commencement of an action rather than by its prosecution to judgment.

The identical question has arisen in several jurisdictions having statutes similar to ours, in which reference is made to the issuance of the writ rather than to the entry of the order. These cases uniformly hold that a writ issued within time supports an order entered after the time has expired. Well reasoned decisions include *Lafayette County v. Wonderly,* 92 Fed. 313 (C.C.A.8); *Luzerne Nat. Bank v. Gosart,* 322 Pa. 446, 185 Atl. 640; and *Thomas v. Towns,* 66 Ga. 78. In Georgia the time for issuance of the writ was three years, and in the case cited the court said: "To hold that a judgment of revival must be had within the period of three years . . . would, we think, be a construction unprecedented in all limitation laws."

II. Our decision in *Hinton v. Willard, ante,* p. 204, 220 S. W. 2d 423, decided May 2, 1949, completely supports the alternative defense of res judicata. There we pointed out that a judgment of revivor is as effective an adjudication as any other judgment and that in a scire facias proceeding the judgment debtor must plead all matters of defense that he has. Even if there were merit in the appellees' attack upon the earlier judgments, the defense should have been asserted in the 1945 proceeding. Hence the appellant must prevail on both grounds.

Reversed and remanded.

SMITH *v.* SMITH.

4-8929 223 S. W. 2d 772

Opinion delivered October 24, 1949.

Ross Robley, for appellant.

Byron Bogard, for appellee.

FRANK G. SMITH, J. This is a continuation of the case of Smith v. Smith, reported in 213 Ark. 636, 212 S. W. 2d, 10, and reference is made to that case for certain relevant and essential facts, which will not be here repeated. The opinion in that case was delivered June 14, 1948. The question there involved was that of the custody of the two children of the parties litigant, one a boy, then three years old, the other a girl, then five years old. It was the opinion of the court in that case that neither parent was the proper custodian of the children, and their custody was awarded to Mrs. Dan Beavers, the foster mother of the mother of the children.

Mrs. Beavers had no children of her own, but she took into her home a little girl, and reared her. This girl became Mrs. Smith, and is the mother of the children involved. It appears that when she was only sixteen years of age, she married Mr. Smith, who was then only seventeen. They went to Benton, where they were married February 14, 1942, without consulting Mrs. Beavers. The testimony shows that Smith, as a boy, was frequently before the Juvenile Court, and his conduct did not improve after his first marriage, and he and that wife separated July 4, 1946, and on July 25th there-

after Smith obtained a divorce. In the decree the children were placed in the custody of Mrs. Beavers, who was referred to as their grandmother, and appellant was directed to pay Mrs. Beavers $60 per month for the maintenance of the children. No part of this allowance was ever paid, and Mrs. Beavers made no effort to enforce its collection.

The chronology of events is not quite clear, but it appears Smith and his wife went to Texas where both were arrested and confined in jail. The charge against them is not stated. When Mrs. Beavers was advised of the situation she went to Texas and found Mrs. Smith in jail, and the boy in a hospital and the girl at Grayton, Texas, in the custody of a lady whose connection with the children was not shown.

The local Juvenile Court took cognizance of the case. Mrs. Beavers asked Smith if he did not want her to have charge of the children, and he said that he preferred that a Miss Ramsey have the custody of the boy. Miss Ramsey's identity and connection with the case is not shown. As we understand the record, the court ordered that the children be delivered to Mrs. Beavers and she returned with the children to her home in Little Rock.

Smith enlisted in the Army and for more than a year Mrs. Beavers heard nothing from him, and during that time he made no contribution to the support of the children. Apparently he had abandoned them. Smith does not have and never had a home of his own. Mrs. Beavers testified that except for a total period of three or four months, the children had lived in her home.

After his discharge from the Army Smith obtained a divorce as above stated, and thereafter married Edna Mae, the daughter of a Mrs. Gisler, with whom they have since made their home. Mrs. Gisler owns a hundred acre farm near Port Allen, Louisiana, but Smith and his wife are both employed in Baton Rouge, Louisiana, which city is four miles from the farm.

Smith made no contribution whatever towards the support of the children. The Juvenile Court officers in

that state finally located Smith and reported his whereabouts to the Prosecuting Attorney, who wrote him about the children. Evidently a prosecution for child abandonment was in the offing and Smith came to Little Rock. He was not prosecuted, but was directed to pay Mrs. Beavers $10 per week for the maintenance of the children, and he has since made those payments regularly. Thereafter, he instituted the suit which eventuated in the decree herein referred to in Smith v. Smith, supra. The court declined to award the custody of the children to either the father or the mother, but awarded the custody to Mrs. Beavers, the foster grandmother, with directions to Smith to pay Mrs. Beavers $60 per month for the maintenance of the children. Thirty-two days after the delivery of the opinion in that case Smith filed the present suit in which he asked the custody of the children. If that relief is granted him, he will be relieved of the necessity of making the payments to Mrs. Beavers which the court directed, but which Mrs. Beavers has never attempted to enforce. In the answer filed by Mrs. Beavers she "denied that there had been such a material change in the status of the parties since the date of the decree as would justify the change of the custody of said children." This second suit following so soon after the decree in the first one, partakes of the nature of a petition for a rehearing, although the second suit is predicated upon the allegation that there has since the first decree been such a change in the situation of the parties as to make it advisable and proper that the custody of the children be changed.

The court refused to order that change, but decreed that Smith be given the right of visitation at all reasonable times, and this appeal is from that order. The practice in cases like this, which has been frequently announced, was reaffirmed in the first decree of Smith v. Smith, supra, where it was said:

"According to our long established rule in cases of this nature: 'In determining the custody of a minor child, the welfare of the child is the supreme and controlling consideration. In the comparatively recent case of Kirby

v. Kirby, 189 Ark. 937, 75 S.W. 2d 817, we said: 'It is the well-established doctrine in this state that the chancellor, in awarding the custody of an infant child or in modifying such award thereafter, must keep in view primarily the welfare of the child, and should confide its custody to the parent most suitable therefor, the right of each parent to its custody being of equal dignity. Act 257 of 1921 (now §§ 6203-6207, Pope's Digest) . . . A decree fixing the custody of a child is, however, final on the conditions then existing and should not be changed afterwards unless on altered conditions since the decree, or on material facts existing at the time of the decree but unknown to the court, and then only for the welfare of the child.' See, also, Phelps v. Phelps, 209 Ark. 44, 189 S. W. 2d 617. The party seeking a modification of a divorce decree awarding custody of a minor child assumes the burden of showing such a change in conditions as to justify such modification. (Citing Cases)' "

As has been said, Smith has never had a home of his own and the children have lived with Mrs. Beavers since they were born, except for a total period of three or four months. He proposes to place these children in the home of Mrs. Gisler, his current mother-in-law, who testified that she would like to have the children in her home, and that she could and would give them all advantages suitable to their station. She gets $250 per year rent on her farm, and drilling for oil is now in progress with fair promise of success. Smith has joined the carpenter's union and gets $14 per day when he works, in Baton Rouge, and his present wife has employment in that city. They are now buying household furniture and intend finally to acquire a home of their own, but they have not yet acquired it.

Smith's persistence manifests the intensity of his desire to have the custody of his children, and his wife testified that he was very anxious to have that custody awarded to him. But of much significance is the fact that she did not testify that she wanted the children or would welcome them into the home.

As a matter of fact, the real controversy appears to be, whether Smith shall take the children into the home of Mrs. Gisler, who has never seen them, but who testified she would be glad to have them, or whether their custody shall remain unchanged with Mrs. Beavers, their foster grandmother, who has had the care and custody of the children all their lives except a few months, and who call her Mama.

The testimony of the then Attorney General, now one of the Chancellors of the State, is that Mrs. Beavers is a woman of excellent character, and other testimony is to the effect that she has a good home, and that the children while living with her will have the proper environment. Mrs. Beavers testified that the mother of the children wanted them in her home, and with the consent of the Juvenile Court officers and the Chancellor, she allowed their mother, who is now Mrs. Spray, to have them for a short time, but she concluded that home was not a proper place for the children, and she carried them back to her own home where they now are and have since been.

We do not think the testimony shows any change in the situation since the former decree except that Smith now has a larger income, nor do we think the testimony shows that the best interests of the children require a change of custody. Smith complains that he was only allowed to see the children in Mrs. Beavers' home, which she admits, but explains by saying that Smith said if he could not have the children he would kill them and their mother too. Smith did not remember making this statement, but admitted saying that if he could not have the custody of the children he did not know what would happen.

The decree denying the change of custody of the children, from which is this appeal, but allowing the right of visitation, is affirmed, but this right of visitation is not to permit the father to remove the children from this State.

St. Louis-San Francisco Railway Company *v.*
Travis Insulation Company.

4-8912 223 S. W. 2d 765

Opinion delivered October 24, 1949.

E. G. Nahler and *E. L. Westbrooke, Jr.,* for appellant.

Ivie C. Spencer, for appellee.

George Rose Smith, J. This suit was brought by Travis Insulating Company, L. W. Hamilton, and Federal Insurance Company, for property damage resulting from a fire caused by the appellant railroad. At the close of the testimony the only instructions offered were

requests for directed verdicts. In accordance with our practice in that situation the trial judge decided all questions of fact, directing a verdict against the railroad upon the Travis and Hamilton claims and in its favor upon the insurance company's claim. Only the railroad has perfected an appeal.

Arkansas Sales Company had leased from the railroad certain property on its right of way for the purpose of maintaining a warehouse owned by the sales company. After the fire the insurance company paid to its insured, the lessee, the amount of its loss and by subrogation asserted its claim against the railroad. Travis and Hamilton had stored personal property in the warehouse and joined in the suit to recover their damages.

Appellant relies upon two paragraphs in its lease to the sales company to exempt it from liability for these claims. The first is paragraph ten, by which the lessee assumed liability for "all damages resulting from fire . . . to property of any kind or character . . . that may now or hereafter be upon said leased premises . . . and to whomsoever the same may belong, whether any such damages shall be caused by negligence of lessor . . . or otherwise. Lessee covenants and agrees to release . . . and to protect, save harmless and indemnify lessor from and against any and all damages in this paragraph referred to . . ."

Provisions of this kind, exempting the railroad from liability to its tenant, are almost universally upheld when inserted in a lease covering property situated on the railroad right of way. Elliott on Railroads (3rd Ed.), § 1760. The placing of property on the right of way is not required by any public duty of the carrier and increases the danger of fire; so the policy that ordinarily prevents a railroad from contracting against the consequences of its own negligence is inapplicable. Without discussion of the principles involved we sustained a similar provision in *Mo. Pac. R. Co.* v. *Barnes,* 197 Ark. 199, 121 S. W. 2d 896.

This provision in the lease, however, does not affect the rights of Travis or Hamilton. The lease does not

purport to extinguish the railroad's possible liability to third persons, as was the case in some of the decisions cited by appellant. Here the lessee merely agreed to indemnify the lessor against such claims and to release any claims of its own. No doubt the trial court ruled against the insurance company for the reason that as subrogee it occupied no better position than its insured, which had already agreed to make no claim for damage by fire.

But the same considerations obviously do not apply to Travis and Hamilton. Their causes of action are not affected by the lessee's agreement to indemnify the lessor. The *Barnes* case, *supra,* seems to lend support to the opposite conclusion only because the facts were not fully stated. The opinion indicates that J. K. Barnes was the lessee, while the court relied upon the lease to defeat the claim of Maggie Barnes—apparently a stranger to the lease. But the transcript and briefs reveal that Maggie Barnes was undeniably a party to the lease. She owned the improvements on the leased premises and was in reality the lessee. J. K. Barnes, her son, had managed her property for years and signed the lease in his own name merely as a matter of convenience. The *Barnes* case is not authority for the position that a clause like the one now in question relieves the railroad from the claims of third persons.

The other provision in the lease relied on by appellant is paragraph sixteen: "Lessee shall have no right to, and will not, assign this agreement or sublet said leased premises, or any part thereof, or permit the same to be used or occupied by any person, firm or corporation other than lessee, without first obtaining the written consent of lessor thereto." The railroad's consent had not been obtained when the Travis and Hamilton property was stored. Appellant, contending that this paragraph of the lease was violated, characterizes Travis and Hamilton as trespassers and cites Elliott on Railroads, *supra,* § 1759, as authority for the statement that a trespasser on the railroad right of way cannot recover for loss caused by fire.

We do not decide whether an entry in violation of the lease would be a trespass; for we do not think that the lease prohibited the action taken by the lessee in this instance. We pass over the prohibitions against assignment or subletting, as the meager testimony in this case does not establish either one. The real question is whether the lessee permitted the premises to be "used or occupied" by Hamilton or Travis without the railroad's consent. We think not. The burden was upon the appellant to prove this affirmative defense. The trial court was justified in believing that the lessee merely allowed Travis and Hamilton to store personal property upon its premises, without relinquishing its own dominion and control. It was not shown that any specified part of the warehouse was turned over to the exclusive possession of these appellees. All that can be said is that the lessee accepted property for safekeeping under its own supervision.

This conduct does not show use or occupancy of the premises by Travis and Hamilton. On the contrary, it was the lessee who was using and occupying the property, for the purpose of storing chattels as a bailee. This conclusion is inescapable when we observe that this is a printed lease, prepared by the railroad and to be construed favorably to the lessee. If the lessor intended to forbid the storage of property belonging to others, it could have put a clause to that effect in the lease. Instead, it merely prohibited use and occupancy by third persons. These two words are often used interchangeably. *Smith v. Mechanics' & Traders' Fire Ins. Co.*, 32 N.Y. 399, and *Jackson* v. *Sewell*, 284 S.W. 197 (Mo.App.). A definition of "use" in Webster's New International Dictionary is: "That enjoyment of property which consists in its employment, occupation, exercise or practice."

In the view we take, the lessee did not violate the terms of its lease in accepting property for storage. This answers the argument that Hamilton at least should be bound by the contract, he being the secretary of the lessee corporation and having attested the lease in its behalf. Hamilton's knowledge of terms of the lease is of

course immaterial if, as we hold, the lease permitted what was done.

In closing its argument the railroad complains of the allowance of an attorney's fee to the appellees. Hamilton recovered only half the amount he sued for, and appellant insists that this fact precludes the award of the fee. That is the rule under our statute allowing attorney's fees in insurance cases, but the reason is that the statute applies only when the insurer fails to pay the loss "after demand made therefor." Ark. Stats. (1947), § 66-514; *Pac. Mut. Life Ins. Co. v. Carter,* 92 Ark. 378, 123 S.W. 384, 124 S.W. 764. The statute applicable to the present case requires only that the plaintiff recover in the action. *Ibid.*, § 73-1014. We have twice upheld the allowance when the plaintiff recovered less than the amount of damages alleged in his complaint. *Kansas City S. R. Co. v. Cecil,* 171 Ark. 34, 283 S.W. 1; *Mo. Pac. R. Co. v. Campbell,* 206 Ark. 657, 177 S.W. 2d 174.

Affirmed.

GRIFFIN SMITH, C. J., and FRANK G. SMITH and HOLT, JJ., dissent.

HOLT, J. I respectfully dissent for the reason that I think the present case is controlled by the decision of this court in *Missouri Pacific Rd. Company* v. *Barnes,* 197 Ark. 199, 121 S. W. 2d 896. The situation in that case was similar in effect to that presented here. Here, the lease was between the Arkansas Sales Company and appellant, and it appears that Hamilton and Travis stored property in the building which was on appellant's right-of-way.

The lease provided against subleasing any part without written notice to appellant. Sections 10 and 16 in the present lease contain the following provisions: "(Lessee) . . . 10. To assume all damages resulting from want or failure at any time of title on the part of Lessor to said leased premises, or any part thereof, and all damages resulting from fire communicated from the right-of-way, premises, locomotives, trains, cars or other instrumentalities of Lessor, or otherwise, to prop-

erty of any kind or character (including, among other things, buildings, structures, improvements, and the contents thereof) that may now or hereafter be upon said leased premises, or any part thereof, and to whomsoever the same may belong, whether any such damages shall be caused by negligence of Lessor or any of its agents, servants or employees, or otherwise. Lessee covenants and agrees to release and does hereby release, and to protect any and all demands, causes of action, suits, judgments, attorney's fees, costs and expenses on account thereof.

"16. Lessee shall have no right to, and will not, assign this agreement or sublet said leased premises, or any part thereof, or permit the same to be used or occupied by any person, firm or corporation other than Lessee, without first obtaining the written consent of Lessor thereto."

It seems to me that the language used is so simple, plain and crystal clear as to require no construction.

Appellees, Hamilton and Travis, were not on appellant's property with permission or consent of appellant, railroad company. The undisputed testimony shows that they had not obtained the written consent of the Lessor, railroad company.

In the Barnes case, *supra,* we held: "RAILROADS —LEASE OF RIGHT-OF-WAY—Fire.—In appellee's action for damages for the destruction of a warehouse by fire owned by her and located on appellant's right-of-way which she had leased for warehouse purposes under a lease providing for written notice of termination thereof and also exempting appellant from liability for loss whether the damage was the result of fire, flood or other agency, held that a verbal notice was insufficient to terminate the lease, and the lease being in force when the loss by fire occurred, appellant was not, under the terms of the lease, liable therefor."

Unless the Barnes case, which, as I see it, is squarely in point here, is overruled, which we refuse to do, the judgment here should be reversed.

Frank G. Smith, J., concurs.

4-8719 224 S. W. 2d 25

Opinion delivered October 10, 1949.

Rehearing denied November 28, 1949.

[redacted]

Gordon Armitage, for appellant.

J. E. Lightle, Jr., for appellee.

ED. F. MCFADDIN, Justice. This is an appeal from a Chancery decree which (a) allowed appellant no relief and (b) sustained the cross-complaint of the appellee, D. C. Davis, for reformation of his deed to appellant.

In 1929 D. C. Davis executed notes to Peoples Bank totalling $10,181.77, and secured by a deed of trust on 537 acres of land. Included in the deed of trust was the 80-acre tract involved in the present suit and hereinafter referred to as the "80-acre tract." The Peoples Bank knew that D. C. Davis owned only a life estate in this 80-acre tract, and that the remainder was owned by the Davis children, who joined in the execution of the deed of trust, but without becoming personally liable for the indebtedness. (For brevity, we will continue to refer to them as the "Davis children," although they were and are adults.) The said notes of D. C. Davis to the Peoples Bank were acquired by the Security Bank some time prior to 1939 with all the notice and knowledge possessed by the Peoples Bank.

In 1939 D. C. Davis, being unable to pay the balance due on the notes, on demand of the Security Bank (hereinafter called "Bank") executed to it a general warranty deed for 388 acres of the land in full settlement of all the balance due on the notes. Included in the 388 acres there was the 80-acre tract in which, as aforesaid, D. C. Davis owned only a life estate. The Davis children did not join in the deed. The Bank surrendered all the notes and other security to D. C. Davis, and entered into possession of the 388 acres described in the warranty deed.

In 1947 the Bank filed the present suit against D. C. Davis and the Davis children, seeking *inter alia,* to have the Bank's title quieted and confirmed to the 80-acre tract. The Davis children by answer and cross-complaint (1) alleged that the Bank held only the life estate of D. C. Davis and (2) prayed that their title be quieted except as to the said life estate. The Bank then by amended complaint prayed (1) that as to the Davis children the Bank be held to be a mortgagee in possession of the 80-acre tract, or (2) that as against D. C. Davis

the Bank recover damages for the breach of his covenant of general warranty as to the 80-acre tract in the 1939 deed. D. C. Davis by proper pleading alleged (1) that the Bank knew he had only a life estate in the 80-acre tract, and (2) that a mutual mistake had occurred in the preparation and execution of the 1939 deed. He prayed that the deed be reformed to show that he conveyed and warranted only a life estate in the 80-acre tract.

Upon the trial of the issues the Chancery Court (1) dismissed the Bank's complaint and amended complaint, and (2) found for D. C. Davis on his cross-complaint and decreed a reformation of the 1939 deed to show that D. C. Davis conveyed and warranted only a life estate to the 80-acre tract. The Bank has appealed.

I. *Reformation.* We hold that the learned Trial Court erred in decreeing the said reformation of the 1939 deed. The cases hold that a court of equity will not reform a written instrument on account of mutual mistake, unless the proof of such mistake be clear, unequivocal and decisive. See *McGuigan* v. *Gaines,* 71 Ark. 614, 77 S. W. 52.[1] The evidence in the case at bar does not measure up to the standard required by our holdings. D. C. Davis testified:

"Q. What did you think you were conveying on the eighty—your full title?

A. To be fair, I didn't know whether it had the eighty acres; I just signed these papers and I turned it over to him,[2] and he said it ought to have been done ten years ago.

Q. You say you don't know the difference between a warranty deed and a quitclaim deed?

A. Yes, sure, it reads on the back of it.

Q. It reads on the back and tells you what it is?

A. Yes.

[1] Other cases so holding are collected in West's Arkansas Digest, Reformation of Instruments, § 45.

[2] The "him" referred to is the representative of the Bank who handled the transaction with Davis.

Q. When you signed that, you knew it was a warranty deed, didn't you?

A. Sure, I knew it was a warranty deed.

Q. And you signed that deed knowing it was a warranty deed, and conveying that property to the bank to get the thing settled?

A. They simply fixed that up.

Q. Did you read that deed?

A. No, I didn't read it.

Q. You had a chance to read it?

A. No, he said, 'I have all the papers here; just sign it and I will give you your notes'; and he gave me the ten thousand dollars worth of notes.

Q. Did you read the deed?

A. No, sir, I didn't read it?

Q. You can read, can't you?

A. Yes, sir.

Q. And you knew it was a warranty deed?

A. I knew it was a deed to turn that stuff loose; I supposed it was a warranty deed."

The person who represented the Bank in the 1939 transaction is now deceased, and no other witness gave any stronger testimony for reformation than what has been quoted above. In short, the evidence as to any mutual mistake fails to be "clear, unequivocal and decisive"; so the decree awarding D. C. Davis a reformation is reversed.

II. *The Bank's Claim Against the Davis Children.* The Bank is not entitled to have its title quieted as against the Davis children. They were remaindermen after the life estate of D. C. Davis; they were not personally obligated on the debt; and there is no evidence that they authorized D. C. Davis to convey their interest to the Bank by the 1939 deed. The Bank's possession of

the land under the 1939 deed was not adverse to the Davis children, and the statute of limitations does not begin to run against the remaindermen during the continued life of the life tenant. *LeSieur* v. *Spikes,* 117 Ark. 366, 175 S. W. 413; *Kennedy* v. *Burns,* 140 Ark. 367, 215 S. W. 618.

III. *The Bank's Claim to Be Mortgagee in Possession.* The Bank is not entitled to any relief, as regards the remaindermen, on its claim that it became a mortgagee in possession when it took the deed from D. C. Davis in 1939 and entered into possession of the 80-acre tract. One sufficient reason for this holding is that the Bank did not take possession of the land under its mortgage, but as a purchaser under the general warranty deed, and has stoutly maintained that there was no mistake in the said deed. In *Williams* v. *Wallace,* 111 Ark. 509, 164 S. W. 301, we held that the relation of mortgagee in possession[3] would not arise unless the taking of possession was done as mortgagee. Such is not shown to exist here. Neither was there a void or defective foreclosure as in *Lesser* v. *Reeves,* 142 Ark. 320, 219 S. W. 15.

IV. *Damages for Breach of Warranty.* The Bank claims that it is entitled to recover damages from D. C. Davis for breach of the covenant of warranty as contained in the 1939 deed; and with this contention we agree. The Bank's claim for damages is not premature. The case at bar is not so similar to the cases of *Deupree* v. *Steed,*[4] *Belleville Land & Lbr. Co.* v. *Griffith,*[5] or *Hamilton* v. *Farmer*[6] as to be ruled by them. Here, the Bank made the remaindermen (the Davis children) parties to the suit; and when they set up their title as remaindermen and prayed that it be quieted, then the Bank sought damages from D. C. Davis for breach of warranty; and the decree of the court in effect found for the remaindermen. These facts differentiate this case from those just cited, and constitute sufficient constructive eviction to prevent the action from being premature.

[3] Other cases concerning mortgagee in possession are collected in West's Arkansas Digest, Mortgages, § 199. See also 41 C. J. 612.

[4] 298 S. W. 494, 174 Ark. 1179.

[5] 177 Ark. 170, 6 S. W. 2d 36.

[6] 173 Ark. 341, 292 S. W. 683.

Equity, having taken jurisdiction in the cross-complaints of the various parties, should retain jurisdiction for all purposes and do complete justice between the parties.[7] So, the Bank is entitled to recover damages from D. C. Davis for breach of the covenant of warranty.

V. *Amount of Damages.* The Bank failed to prove any damages. There was no proof as to the value of the land, the life estate, the remainder, or the value of this 80-acre tract as compared with the other lands in the deed. In short, there was an entire absence of any proof of damages. In *Seldon* v. *Dudley E. Jones Co.,* 89 Ark. 234, 116 S. W. 217, we held that if the covenantee failed to prove any actual damages, then he could recover only nominal damages; and the rule of that case applies to the case at bar. Furthermore, in *Bass* v. *Starnes,* 108 Ark. 357, 158 S. W. 136, and *Dilley* v. *Thomas,* 106 Ark. 274, 153 S. W. 110, we held that when the plaintiff is entitled to nominal damages only, judgment will be rendered in this Court for such nominal damages and costs.

Therefore the judgment of the Chancery Court is reversed and the judgment is rendered here for appellant and against appellee, D. C. Davis, for nominal damages of one dollar for breach of the covenant of warranty; and this judgment carries with it all the costs of this case in both courts.

PINKERT *v.* LAMB.

4-8901 224 S. W. 2d 15

Opinion delivered October 17, 1949.

[7] For a collection of cases recognizing and enunciating this well-known rule of equity, see West's Arkansas Digest, Equity, § 39.

William J. Kirby and *U. A. Gentry,* for appellant.

J. H. Carmichael, Jr., J. H. Carmichael, Sr., and *Tilghman E. Dixon,* for appellee.

MINOR W. MILLWEE, Justice. This cause was begun by appellant, Ed Pinkert, as an action in ejectment in Pulaski Circuit Court to establish title and right to possession to the west ½ of lots 1 to 6, inclusive, block 8, Adams Addition to the City of Little Rock. Appellant claimed title through mesne conveyances from Sewer Improvement District No. 94 of Little Rock which purchased the lots at the commissioner's sale pursuant to a decree of the Pulaski Chancery Court rendered November 23, 1937, condemning said property to be sold for delinquent assessments.

Although the complaint alleges that appellee, John Lamb, was in possession of the lots as tenant of James H. Stith, it was stipulated that appellee, Ella Stith, widow of James H. Stith, was the record title owner prior to sale of the lots to the improvement district and held possession through the tenant, Lamb. In their answer appellees attacked the foreclosure decree and sale of the property thereunder as being void for various reasons, and charged that the decree, the deed from the commissioner thereunder and the deed to appellant constituted a cloud upon appellees' title and should be canceled.

The cause was transferred to the chancery court where trial resulted in a decree finding all the issues in favor of appellees; finding that the sale of the property under the 1937 foreclosure decree was void and that the deeds executed pursuant thereto, including the deed to appellant, should be cancelled and that title to the property should be quieted and confirmed in appellee, Ella Stith. This appeal follows.

The property in controversy is situated in Sewer Improvement District No. 94. In 1927, the district filed suit in chancery court to foreclose its lien for delinquent assessments, but the record does not reflect that the lots here involved were included in the original proceeding.

There was evidence of personal service on James H. Stith in 1931, but any delinquencies against the lots in controversy prior to 1931 were presumably paid and the lands redeemed. Later the pleadings were amended to foreclose for delinquencies for subsequent years and the decree of November 23, 1937, was entered condemning the lands herein to be sold for the delinquent assessment for the year 1934. Pursuant to the 1937 decree the lots were sold to the district on March 16, 1938, and the sale confirmed April 12, 1938.

On August 20, 1943, the chancery court, on petition of a receiver of the district, authorized the latter to sell to James Newsome 340 certificates of purchase at $5.50 each, which included the certificate of purchase covering the lots herein. Thereafter Newsome assigned the certificates of purchase to Jack Barry who in turn assigned the certificates to W. I. Stout, Trustee. After expiration of the time for redemption the commissioner of the court, upon the petition of W. I. Stout, Trustee, and order of the court pursuant thereto, executed and delivered to W. I. Stout, Trustee, a deed to the property on October 12, 1943, and same was approved by the court on the same date. Prior to execution of this deed Mary Kimbrough filed an intervention for herself and others similarly situated, attacking the sales of the certificates of purchase and asking that same be canceled and that all owners be permitted to redeem from the commissioner's sale. A consent decree was rendered on September 30, 1943, as a result of this intervention which gave owners of the delinquent lands involved 120 days to redeem from the sale by payment of all delinquencies. The decree further provided that the title to all property not redeemed within the 120 day period should vest unconditionally in the said W. I. Stout, Trustee. The lots here involved not having been redeemed, W. I. Stout and wife conveyed the property by quit claim deed to appellant for a valuable consideration May 26, 1944.

It was further stipulated that benefit assessments were made and taxes levied against the west half of lots 1 to 6, inclusive, block 8, Adams Addition to the City of

Little Rock, as a single tract rather than against each separate lot or parcel, and that same was sold by the commissioner under the 1937 decree under the same description and as a single tract.

This is a collateral attack by appellees on the 1937 foreclosure decree and sale made pursuant thereto, and the burden was on them to prove such defects therein as would render the sale and decree void. Since the trial court found in appellees' favor as to all issues, we proceed to a consideration of the alleged defects upon which appellees rely to sustain the decree.

I. *Collusion and Inadequacy of Consideration in Sale of Certificates of Purchase.* The case of Schuman v. Cherry, ante, p. 342, 220 S. W. 2d 817, involved the validity of the proceedings now under attack. The appellees there, as here, relied upon the cases of Eddy v. Schuman, 206 Ark. 849, 177 S. W. 2d 918, and Schuman v. Eddy, 207 Ark. 925, 184 S. W. 2d 57 to sustain their charge of inadequacy of consideration and collusion in sale of the certificates of purchase. These cases involved a class suit brought by a property owner in an improvement district for protection of the interests of the landowners and the district. In Schuman v. Cherry, supra, we said: "In the present suit, the district and the commissioners are not parties; so the Schuman-Eddy cases are not in point. Appellees' purpose is not to protect the rights of the district and property holders, but to obtain a title for the appellees. Again—for the sake of argument and without deciding the question—if we concede that the sale of the certificates to Newsome should be set aside, still that holding would return the certificates to the district and would not benefit the appellees, because—as heretofore stated—they had only five years from the foreclosure sale in which to redeem. See *Hopkins* v. *Fields,* 202 Ark. 890, 154 S. W. 2d 22. The time for redemption has long since expired, so appellees are not benefited, whether the title to the three lots be in the appellant or in the district."

While appellees alleged in their answer that there was collusion on the part of the commissioners and the

purchaser in the sale of the certificates of purchase, they introduced no evidence to sustain this allegation. We are asked to overrule *Schuman* v. *Cherry, supra,* but we decline to do so. What we said in that case applies here, and the sale of the certificates of purchase, though invalid, would not affect the jurisdiction of the court to render the decree and would not render the sale of the property made thereunder void on collateral attack.

II. *Insufficient Description.* The property involved was assessed and sold as "West ½ of Lots 1-6, incl., Block 8, Adams Addition to the City of Little Rock." It is insisted that this is an invalid and indefinite description which renders the sale void. Appellees cite a number of cases, but none of them involve a description similar to the one here employed. It cannot reasonably be contended that superior or technical knowledge would be required to locate the west half of named lots in a given block in a platted addition such as is involved here. We hold the description valid and sufficient.

III. *Property Not Assessed Nor Sold According to Law, and Sold En Masse for Only Part of Indebtedness.* Appellees say that a sale of property *en masse* is void even when the property is assessed *en masse* as a single tract. It is also insisted that it is mandatory under our statutes that each parcel of land be assessed separately. The case of *Board of Commissioners, Paving Improvement District No. 13* v. *Freeman,* 201 Ark. 1061, 148 S. W. 2d 1076, involved a foreclosure for delinquent assessments in a municipal improvement district where the assessment was against lots 2, 3, 6 and north half of lot 7 in a given block. In construing the statute now appearing as Ark. Stats. (1947), § 20-404, which prescribes the method of making assessments, the court said: "We think a fair construction of the act is that where one person owns several lots, blocks or parcels of land in an improvement district the benefits to them may be assessed together. It certainly was not the intention of the Legislature where a person owned a large number of lots in an improvement district that benefits to each of his lots, blocks or parcels of land, in order to be valid, must be assessed

to each lot, block or parcel of land owned by him. This construction would certainly entail a lot of unnecessary labor on the part of the assessors where one assessment would answer the purpose. A majority of this court in construing a statute similar to this relating to drainage districts, in the case of *Curtsinger* v. *Burkeen,* 126 Ark. 94, 189 S. W. 673, ruled that an assessment of benefits *en masse* was not void."

In *Hires* v. *Douglas,* 198 Ark. 559, 129 S. W. 2d 959, relied on by appellees, the sale was for a gross sum of several lots separately assessed which was held to be void. Here the property was assessed as a single tract and the foreclosure and sale were *in solido* and were not thereby rendered invalid.

Appellees also urge that the property sold at the foreclosure sale for only the delinquent tax and penalty, without interest and costs, which amounted to a fatal defect. It is true that *Hires* v. *Douglas, supra,* formerly was authority for appellees' contention that the lands must be sold for the taxes, interest, penalty and costs, and that if all of these elements are not included in the sale, it is void. However, that case was overruled on this point in the recent case of *London* v. *Montgomery,* 211 Ark. 434, 201 S. W. 2d 760, where, in reference to the Hires case, we said: "We think that part of the decision holding that the Court was without power to order a sale for less than the total obligation, including interest, was wrong. It was error not to require all of the debt elements to be adjudicated, but this did not deprive the Court of jurisdiction as to the foreclosure."

IV. *Appointment of Receiver Void and Title to Property Could Not Be Transferred by Assignment of Certificates of Purchase.* The record discloses that after sale of the lots to the district, the court appointed a receiver to take charge of the properties and collect the rents. Subsequently the court authorized the sale and assignment of the certificates to Newsome. Appellees contend that the appointment of a receiver and assignment of certificates were unauthorized and void. We held against this contention in *Schuman* v. *Cherry, supra,*

and there said: "Appellants gain nothing by their present contention, because the title to the lots would be in the district even if we should ignore the receivership, the sale of the certificates and the deed to Stout; and with the title in the district, appellants could not now redeem. . . ."

Appellees here are in the same position as the appellees in that case and an irregularity in the appointment of the receiver and transfer of the certificates of purchase would not void the foreclosure sale of the property on collateral attack in a suit in which the commissioners of the district are not parties.

V. *The Warning Order or Notice of Pendency of Suit Listed the Names of the Supposed Owners as James H. Smith and Wife, Ella, Instead of James H. Stith and Wife, Ella.* Act 207 of 1937[1] prescribed the type and manner of service when the foreclosure decree was rendered November 23, 1937. This act provides for service on all delinquent defendants by publication of a warning order or notice of the pendency of suit weekly for four weeks. Section 2 of the Act (Ark. Stats. 1947, § 20-441) provides: "On receipt of such delinquent list the board of commissioners shall enforce the collection of such past due assessments by proceedings in the Chancery Court of the County in which said improvement district is situated; and said court shall give judgment against said lands, lots, blocks, or parcels of land, railroad tracks and right-of-way, for the amount of such taxes or assessments, together with the penalty and interest on same, attorneys fees and costs of the proceedings. Such judgment shall provide for the sale of said delinquent lands for cash by a commissioner of the court, after advertisement hereinafter set out. Said proceedings and judgment shall be in the nature of proceedings *in rem,* and it shall be immaterial that the ownership of the said lands, lots, blocks, or parcels of land, railroad tracks and right-of-way be incorrectly alleged in said proceedings, and such judgment shall be enforced wholly against such property,

[1] This Act was amended by Act 130 of 1939 and Act 195 of 1949, which are inapplicable here.

and not against any other property or estate of said defendant. In listing said lots, blocks, or parcels of land, railroad tracks and right-of-way, the property may be shown as a single improvement; that is, if a building occupies more than one lot or tract of land, the property may be listed together on one line."

Section 3 of the Act provides for publication of the notice, prescribes the form to be used and then provides: "Then shall follow a list of supposed owners, with a description of each separate property that is delinquent, and amount due thereon respectively as aforesaid."

The proof of publication of the notice or warning order lists the west half of lots 1, 2, 3, 4, 5 and 6 of block 8, Adams Addition in the name of James H. *Smith* and wife, Ella, as owners instead of James H. Stith and wife, Ella. Appellees contend this notice was void as being in violation of the due process clauses of the Constitution of the United States.

Act 207, *supra,* and other acts with similar or identical provisions as to service have been before us in numerous cases. The case of *Ballard* v. *Hunter,* 74 Ark. 174, 85 S. W. 252, involved the validity of service against a nonresident owner of lands in a levee district who was not named as a party defendant. In construing an act with identical provisions insofar as service on nonresidents is concerned, Justice Battle, speaking for the court, said: "The fact that the lands in controversy were the property of Mrs. Josephine Ballard, and that she was not made a party defendant to the suit instituted to enforce the collection of the taxes thereon, does not affect the decree therein and the sale thereunder. The act provides that such suit and decree shall be in the nature of proceedings *in rem,* and that 'it shall be immaterial that the ownership of the lands may be incorrectly alleged in said proceedings.' Acts of 1895, p. 89." On appeal the U. S. Supreme Court, in *Ballard* v. *Hunter,* 204 U. S. 241, 27 S. Ct. 261, 51 L. Ed. 461, affirmed and said: "The complaint showed that Ballard was the owner of the lands and that he was a nonresident of the county. It was said, however, that Josephine Ballard was not made

a defendant in the suit, though the records of the county showed that she was an owner thereof. But the statute provided against such an omission. It provided that the proceedings and judgment should be in the nature of proceedings *in rem,* and that it should be immaterial that the ownership of the lands might be incorrectly alleged in the proceedings. We see no want of due process in that requirement, or what was done under it. It is manifest that any criticism of either is answered by the cases we have cited. The proceedings were appropriate to the nature of the case."

It is the rule generally that the states have more control over the form of service upon their residents than upon nonresidents. 12 Am. Jur., Constitutional Law, § 595. One of the grounds of invalidity urged against a special act creating a road improvement district in *Vietz* v. *Road Imp. Dist.,* 139 Ark. 567, 214 S. W. 50, was that it authorized the commissioners to advertise and sell delinquent lands without bringing a proceeding against the owner, but by description of the land only. In disposing of this contention the court said: "The fourth ground of attack seems to be that the Legislature has no authority to authorize a foreclosure of a tax lien by proceedings *in rem,* or by proceedings in the nature of proceedings *in rem,* but we have upheld such authority in cases dealing with a similar provision in other special statutes creating improvement districts, as well as general statutes authorizing organization of improvement districts in municipalities. *McCarter* v. *Neil,* 50 Ark. 188, 6 S. W. 731; *Greenstreet* v. *Thornton,* 60 Ark. 369, 30 S. W. 347, 27 L. R. A. 735; *Ballard* v. *Hunter,* 74 Ark. 174, 85 S. W. 252."

The holding in the Vietz case, *supra,* was reaffirmed in the recent case of *Wood* v. *Gordon,* 207 Ark. 932, 183 S. W. 2d 517. That case involved the validity of Ark. Stats. (1947), § 21-546, which provides the same method of procedure and service in drainage districts as is prescribed for municipal improvement districts in Act 207, *supra.* The court in that case rejected the resident appellant's contention that the method of service by pub-

lication was unconstitutional and cited numerous cases to support its holding.

The case of *Simpson* v. *Reinman,* 146 Ark. 417, 227 S. W. 15, lends support to appellees' contention as to validity of the publication notice under attack. That case has been distinguished on the facts in later cases which have upheld the validity of notice by publication under identical statutes. See, *Security Mtg. Co.* v. *Herron,* 174 Ark. 698, 296 S. W. 363; *Deaner* v. *Gwaltney,* 194 Ark. 332, 108 S. W. 2d 600. In *Taylor* v. *Heinemann,* 199 Ark. 1101, 137 S. W. 2d 742, the court had under consideration the same provision as to service in a levee district statute and said: "This statute is in all essential respects identical with the statute construed in *Simpson* v. *Reinman, supra.* That case was decided by a divided court, and without expressing any opinion as to the correctness of the reasoning of the majority, we decline to overrule it. However, we decline to extend the holding there announced, which we feel we would be compelled to do, in order to affirm the decree here in question. The facts in that case were that one Adams was listed as the 'supposed owner' of the tract of land there delinquent for road improvement assessments. As to him the opinion recites: 'It is not shown that he ever had any title to the property or that he was in possession of it, or made any claim thereto at the time the foreclosure proceedings were had.' . . . In the opinion on rehearing in *Simpson* v. *Reinman, supra,* the late Judge HART, said: 'As we have already seen, while the statute requires them to designate the supposed owners, it relieves them of the consequences of mistakes on their part by providing that a mistake in the allegations of ownership of the land shall not be material. In other words, it does away with the rule that giving of the name of the owner incorrectly invalidates the sale; but the Legislature did not intend to bind the owner where the commissioners named a person as the "supposed owner" who they knew had no interest whatever in the land, or when they acted with gross carelessness in the matter.' "

In the case at bar there is nothing in the record to indicate that there were such persons as James H. Smith and wife, Ella, or that the inclusion of their names was anything more than a typographical mistake of one letter in incorrectly stating the name of Stith. Nor can we say that the commissioners acted with gross carelessness in the matter. To so hold would extend the doctrine of *Simpson* v. *Reinman* to the point of rendering the statute absolutely meaningless insofar as a mere incorrect statement of the supposed owners' name is concerned. We conclude that the holding in that case is not controlling here and that there was a substantial compliance with the statute relating to publication of the notice which was valid and binding on appellees.

VI. *Appellant Barred by the Seven Year Statute of Limitations.* Appellees have been in possession of the lands in controversy since the 1938 foreclosure sale and interposed the plea of the seven year statute of limitations (Ark. Stats. 1947, § 37-101) as a bar to appellant's cause of action. The sale to the improvement district was on March 16, 1938, and was confirmed on April 12, 1938, and this action was begun on April 12, 1945. Appellees say the statute begins to run from the date of sale while Ark. Stats. (1947), § 20-1143, upon which they rely, provides that the tax purchaser shall have the right to possession upon confirmation of the sale. Appellant insists that mere possession of the original owner after a judicial sale would not become adverse to the purchaser until expiration of the period of redemption. It is unnecessary to determine which, if either, contention is correct in this case in view of a provision of Act 82 of 1945 which now appears as the last proviso in § 37-101, *supra,* and reads: "Provided, however, that this section shall not apply to lands which have been sold to any improvement district of any kind or character for taxes due such districts." The 1945 act became effective February 21, 1945. If it be conceded that the statute of limitations started running April 12, 1938, when the sale was confirmed, the statute was repealed as to an action to recover lands sold to an improvement district prior to the running of the seven year statutory period.

In *Paragould* v. *Lawson,* 88 Ark. 478, 115 S. W. 379, property owners contended that the City of Paragould had lost its rights by adverse possession under a dedication of certain streets to the city. Before expiration of the statute bar the Legislature enacted Ark. Stats. (1947), § 19-2305, which had the effect of denying the defense of adverse possession to the property owners. The court said: "Even if adverse possession began before the passage of the statute referred to above exempting cities of the second class from the operation of the statute of limitation on this subject, the possession had not continued for sufficient length of time for the statute bar to attach, and it was within the power of the Legislature to repeal the statute of limitations as to cities or to exempt cities from the operation thereof. There is no such thing as a vested right in a statute of limitation, and the Legislature can repeal the statute or suspend its operation before a cause of action is barred under it. *Dyer* v. *Gill,* 32 Ark. 410; *Pearsall* v. *Kenan,* 79 N. C. 472, 28 Am. Rep. 336; *Hill* v. *Boyland,* 40 Miss. 618; *Smith* v. *Tucker,* 17 N. J. L. 82; 8 Cyc. 921; 25 Id. 988." So here, the possession had not continued for a sufficient period of time for the statute bar to attach when the 1945 Act became effective and appellees have no vested right in the statute.

We conclude that the trial court erred in dismissing appellant's complaint and cancelling the sale to the improvement district and conveyances based thereon. The decree is accordingly reversed and the cause remanded for further proceedings not inconsistent with this opinion.

AETNA LIFE INSURANCE COMPANY *v.* MAHAFFY.

4-8933 224 S. W. 2d 21

Opinion delivered October 24, 1949.

Rehearing denied November 28, 1949.

John M. Lofton, Jr., and *Owens, Ehrman & McHaney*, for appellant.

Coleman, Gantt & Ramsay, for appellee.

LEFLAR, J. In March, 1942, the defendant Edward P. Mahaffy applied for and was issued $20,000 of life insurance, in eight policies for $2,500 each, by plaintiff Aetna Life Insurance Company. The policies contained identical clauses providing for double indemnity in event of death by accidental means and for waiver of premiums

in event of total disability before age sixty. A two-year incontestability clause applied only to the principal life insurance obligation, and not to the double indemnity and waiver of premium on total disability provisions.

On or about March 1, 1946, Mahaffy made claim for waiver of premiums under the total disability clauses, asserting blindness as a ground, this being one of the forms of total disability listed in the policies. After some investigation of the circumstances connected with the inception of the policies, the Company in May, 1946, notified Mahaffy that it would cancel the contestable portions of the policies on account of alleged "material misrepresentations" connected with his application for the insurance in 1942. The effect of the Company's allegations was that Mahaffy had concealed his approaching blindness when he applied for the insurance. Mahaffy refused the Company's request that he deliver up the policies for rewriting. The Company then filed this bill in equity praying that the contestable portions of the policies be cancelled, and Mahaffy cross-complained asking that the clauses providing for waiver of premiums be declared operative as of the date when total disability was claimed. The Chancellor after hearing evidence found all issues for the defendant, both on the original bill and the cross-complaint, and decreed that the policies were effective according to their terms. This included a determination that Mahaffy should receive back from the Company the amount of certain premiums (which he had paid in order to be sure the policies were kept alive, after claiming rights under the waiver of premium clauses) plus interest, damages, costs and a $1,000 attorneys' fee. From this decree the Company appealed.

The evidence indicates that Mahaffy had started wearing glasses during the year before March, 1942, when he applied for these policies and that on December 11, 1941, he made a short call on Doctor R. J. Calcote, a Little Rock physician specializing in eye diseases. Mahaffy testified that the purpose of the visit was "to see about new glasses." Doctor Calcote in his private notes on the visit indicated that Mahaffy's trouble was "prob-

ably *retinitis pigmentosa.*" This is an incurable disease normally leading to blindness, and is in fact the disease from which it was later ascertained that Mahaffy suffers. The doctor, however, did not tell Mahaffy what his diagnosis was, except that he had "gun barrel vision" which he explained as being a narrowing of the field of vision comparable to that which occurs when one looks down the barrel of a gun. The width of the area of Mahaffy's vision was then about one-third of the normal field. He warned Mahaffy that he ought not to drive a car, at least in heavy traffic, but apparently did not say anything that would warn a layman such as Mahaffy that he was going blind. He did not prescribe new glasses. Mahaffy had no further contact with Doctor Calcote until 1946 because the doctor went into the Army shortly after the December, 1941, consultation.

Within a few months *after* the policies were issued, Mahaffy consulted three other doctors about his eyes. These included a specialist at Memphis whose diagnosis was inconclusive, his family physician at Little Rock who undertook no diagnosis, and Mayo's Clinic at Rochester, Minn., where on August 26, 1942, his condition was definitely diagnosed as *retinitis pigmentosa.* At Mayo's he was told that he had this disease and that by reason of it the range of his vision would become narrower and narrower until he was blind. No hope for cure was held out to him.

The "history" given by Mahaffy to each of the physicians consulted by him indicated an awareness on his part for some time past that there was something wrong with his eyesight. There were sharp differences in the testimony as to how far this awareness went.

After the consultation at Mayo's, Mahaffy returned to Jefferson county where he continued his normal and numerous activities at his store, gin, and plantation, though his failing eyesight made it increasingly difficult for him to do many of the things that he had done freely before. Late in 1943 his son was discharged from the Army so that he might begin to take over the

management of the farm, and by 1945 or 1946 Mahaffy's activities were limited largely to an advisory character. This was the situation when he made his claim for waiver of premiums under the total disability clauses.

The insurance application form which Mahaffy filled out in March, 1942, which was made a part of the policy, included the following questions and answers:

"j. Have you had regular or occasional health examinations? Yes. Date of last? Nov. - 41. By Doctor Lowe. Address Pine Bluff, Arkansas.

"k. Name of any impairments ever found. None.

"l. When and for what reason did you last consult a physician? Nov. - 1941 - check up.

"m. May any of these physicians be conferred with and disclose facts known to them? (Yes or No) Yes."

The form also included inquiries concerning several specific parts or areas of the body, *not* including the eyes or eyesight.

There was evidence that a separate series of questions was orally propounded to Mahaffy by the Company's medical examiner, though not made part of the policy, including the question: "Is there any impairment of eyesight?" to which the reply was "No." As to this, Mahaffy testified that he did not remember being asked the question, but "I imagine I said that . . . because I didn't think it was anything that glasses wouldn't cure." Defendant's examiner testified that he and the Company were not interested in such ordinary impairments of vision as might be corrected by wearing glasses, and that he would "probably not" have made any note of the fact that there was an impairment of vision corrected by wearing glasses. Mahaffy explained his failure to mention the visit to Doctor Calcote, in his answer to the inquiry concerning "health examinations," by testifying that he went to Calcote principally "to see if he could improve on" his glasses, that he attached no particular importance to the reference to "gun barrel vision," and that no information he had received up to

that time indicated to him that there was anything really serious the matter with his eyes.

The problem here is primarily one of fact. Appellant and appellee are agreed that this is true, and they are also substantially agreed on how this problem must be stated, in view of the Chancellor's finding for the insured below. The question is whether a preponderance of the evidence in the record shows a knowing misrepresentation, or a knowing concealment, by Mahaffy, of the fact of incipient blindness.

"If the applicant states what he honestly believes to be true regarding his physical condition, the fact that it turns out to be not true does not avoid the policy, as it is a representation merely. Of course, if his statements are false and known to him to be false, and are made fraudulently, they have the same effect as warranties. . . . The question will be then were his statements made in good faith, if untrue, or were they made knowing them to be false and for the purpose of defrauding. . . ." *Harper* v. *Bankers Reserve Life Co.,* 185 Ark. 1082, 1085, 51 S. W. 2d 526, 528. "The questions propounded in the application . . . call for answers founded on the knowledge or belief of the applicant, and in such cases a misrepresentation or omission to answer will not avoid the policy unless willfully or knowingly made with an (intent) to deceive." *Metropolitan Life Insurance Co.* v. *Johnson,* 105 Ark. 101, 106, 150 S. W. 393, 395. "This court has often held that questions propounded to applicants for insurance with respect to consultation with and treatment by physicians do not contemplate answers with respect to trivial ailments. . . ." *Southern National Insurance Co.* v. *Pillow,* 206 Ark. 769, 778, 177 S. W. 2d 763, 767. "The burden is upon (the insurer) to establish the fraud by proving affirmatively the falsity, materiality and bad faith in the representations made by the insured in the application regarding his health." *Old Colony Life Insurance Co.* v. *Julian,* 175 Ark. 359, 365, 299 S. W. 366, 368.

We have analyzed the evidence in this record with great care. Our conclusion is that we are unable to say

that the finding of the Chancellor, in favor of the insured, on the question properly before him, was contrary to a preponderance of the evidence.

Appellant Company raises a further question under the policy clause which provides: "That no such policy shall become effective until the first premium upon it is paid during the good health of the insured. . . ." The contention is that, since insured was in fact suffering from *retinitis pigmentosa,* whether he knew it or not, the first premium actually was not paid "during the good health of the insured." This provision does not constitute a warranty of good health at the time specified, but only amounts to a stipulation for apparent good health and good faith in the applicant. Further, the clause is directed primarily to diseases or injuries, seriously affecting the risk, which develop or are discovered by the insured after the application and examination are completed, as distinguished from conditions which are presumably checked on by the insurer's earlier examination. See *Lincoln Reserve Life Insurance Co.* v. *Smith,* 134 Ark. 245, 203 S. W. 698; Appleman, Insurance Law and Practice (1941), § 154; Cooley, Briefs on Insurance (1927) 648. The statement in *National Life & Accident Insurance Co.* v. *Matthews,* 198 Ark. 277, 128 S. W. 2d 695, that a somewhat similar clause constituted a warranty is not relevant here, since that case, unlike this one, involved a so-called "non-medical policy," issued without physical examination by the insurer. See *National Life & Accident Insurance Co.* v. *Young,* 200 Ark. 955, 141 S. W. 2d 838.

Appellee has asked this Court to allow a further attorneys' fee, in addition to that allowed by the Chancery Court. This we decline to do.

The decree of the Chancery Court is affirmed.

THACKER *v.* HICKS.

4-8942 224 S. W. 2d 1

Opinion delivered October 24, 1949.

Rehearing denied November 28, 1949.

[redacted]

W. Leon Smith, for appellant.

Cecil Grooms, for appellee.

MINOR W. MILLWEE, Justice. This is an action in forcible entry and unlawful detainer by appellants, L. F. Thacker and W. T. Kitchen, against appellees, Steve Hicks and wife, Tommie Hicks. This is the second appeal of the case. On the former appeal in *Thacker* v. *Hicks,* 213 Ark. 822, 212 S. W. 2d 713, we held there was substantial evidence to support the verdict and that there was no error in the giving and refusing of instructions, but the cause was reversed on account of the admission of certain testimony prejudicial to appellants.

Appellant, L. F. Thacker, originally instituted an action in forcible entry and detainer against appellees in September, 1946, alleging that he was lessee of a large acreage of farm lands, including the Frl. North ½ of the SE ¼ of Sec. 29, Township 18 North, Range 8 East in Greene County, containing 44.82 acres, which appellees forcibly and unlawfully occupied and refused to vacate. In February, 1947, appellant, W. T. Kitchen, intervened and asserted that the term of Thacker's lease had expired and that Kitchen had succeeded to Thacker's rights by virtue of a lease from the owner, Lester Kent. On October 6, 1947, Kitchen filed an amended complaint and intervention setting up unlawful detainer as an additional cause of action under an alleged oral rent agreement for the year 1946 between Thacker and appellees.

In their answer appellees denied generally the allegations of the complaint and asserted title and right to possession of the lands by adverse possession. Having been removed from the lands by the sheriff under a writ executed on February 19, 1947, appellees also asked for restitution of possession and damages.

The first trial resulted in a verdict and judgment for appellees for restitution and damages in the sum of $250. A similar result followed the trial from which comes this appeal, except that the amount of damages was fixed at $300.

The evidence at both trials was substantially the same and tended to show that appellees moved on the lands in controversy in 1931; that they erected improvements thereon and cultivated a part of the lands under claim of absolute ownership until 1941. In December, 1941, Charles Davidson, an employee of a lessee of the record owner of the lands, filed an affidavit in the probate court that appellees were insane. After examination, appellees were adjudged insane and committed to the State Hospital where they remained for approximately four months. Immediately after execution of the commitment, Davidson moved on the property in controversy, and tenants of lessees of the record owner remained in possession until the latter part of 1945 or the early part of 1946, when appellees, finding the property vacant, moved back on the land where they resided until evicted in February, 1947.

On the second trial appellants introduced a complaint, summons, writ of possession and default judgment in ejectment rendered against appellee, Steve Hicks, on March 4, 1941, in favor of the purported record owners of the lands in controversy. There is no evidence of service of the writ of possession and, as heretofore stated, appellees were removed from the lands under the insanity proceedings in December, 1941.

After remand of the case on the first appeal, Lester Kent, the alleged record owner, filed an ejectment suit against appellees on October 2, 1948. When the instant suit came on for trial October 13, 1948, service had not ripened in this ejectment action and appellees had not pleaded thereto. Appellants filed a "Plea in Bar" alleging that a determination of the new ejectment suit by the purported record owner would determine the issues in the instant case, because appellees' defense herein was based on a claim of title by adverse possession and a denial of title in appellants' lessor. The pendency of the ejectment suit was pleaded as a bar of appellees' right to maintain their cross-complaint in the present action, and it was prayed that the instant case be continued until the ejectment suit could be tried.

The action of the trial court in overruling the plea in abatement and proceeding with the trial of the forcible entry and unlawful detainer action is the first ground urged by appellants for reversal of the judgment. It is insisted that appellees' claim of adverse possession and denial of title in appellants' lessor could only be finally determined in the ejectment suit. It will be noted that appellants are not claiming title to the lands in controversy and chose forcible entry and unlawful detainer as the proper form of action. The alleged record owner has not seen fit to intervene in the instant suit nor have appellants requested a consolidation of this action with the ejectment suit. If the record owner had intervened in this suit, the actions of forcible entry and unlawful detainer and ejectment could have been properly consolidated. *DeClerk* v. *Spikes,* 206 Ark. 1004, 178 S. W. 2d 70.

Section 34-1519, Ark. Stats. (1947), provides that in actions of forcible entry and unlawful detainer the title to the lands shall not be adjudicated, nor proved, except to show the right to possession and the extent thereof. Section 34-1520 provides that a judgment in a forcible entry or unlawful detainer action shall not bar a suit in ejectment. Under § 34-1522, an ejectment action may be instituted and prosecuted during the pendency of an action in forcible entry and unlawful detainer. In *Necklace* v. *West,* 33 Ark. 682, appellant contended that his action in unlawful detainer should be treated as one in ejectment and, in construing the above sections of the statute, the court said: "Counsel for appellant submits that the complaint contains all the material allegations requisite in a complaint in ejectment, and that under the code practice he ought not to fail in the suit because of a mistake in the proper form of action.

"This may be true as a general rule, but it would be an unjust application of the rule to allow a plaintiff to bring the statutory action of unlawful detainer, deprive defendant of possession of the premises in advance of a trial, fail upon a trial to prove his right to maintain the action, and then avoid the consequences of the mistake, and defeat the defendants claim to damages under the

statute for having been wrongfully dispossessed in a summary mode, by taking judgment in ejectment.

"That the statute did not intend to substitute unlawful detainer for ejectment, is manifest from its provisions that a judgment in the former action shall be no bar to the latter, and that ejectment may be brought during the pendency of unlawful detainer. . . ."

The setting of the docket and granting or refusing a continuance is a matter within the sound discretion of the trial court. We find no abuse of that discretion in requiring appellants to retry the instant suit which they instituted more than two years before.

It is next insisted that the court erred in the admission of testimony by various witnesses to the effect that appellees had been claiming the lands in controversy as their own since 1931. It is conceded by appellants that declarations by one in possession of real property, although self-serving, may be admissible as a part of the *res gestae,* but it is now insisted that such testimony is inadmissible unless the party offering it lays the proper foundation therefor by first showing the time, place and circumstances of the making thereof. Appellants did not object to the testimony on this ground at the trial. They rely on the case of *Strickland* v. *Strickland,* 103 Ark. 183, 146 S. W. 501. That case involved an ejectment action in which one of the parties attempted to attack the deed of the other as a forgery by self-serving declarations of one who was not in possession of the land at the time the declarations were made. The court held that such declarations were not admissible to destroy the record title, but said: "Such declarations made by a person in possession are competent simply to explain the character and extent of the possession in a given case."

The question of title is not involved in the case at bar except to show the right and extent of possession. It is held generally that declarations of a person in possession of land showing that he held in his own right and not as the agent of another are admissible on the

principle of res gestae. 36 C. J. S., Forcible Entry and Detainer, § 55 b (1); 31 C. J. S. Evidence, § 248. In 2 C. J. S., Adverse Possession, p. 828, it is said: "Declarations of a person in possession of land which show his claim of ownership are admissible as evidence of the hostility of his possession." This court has frequently held that the declarations of a person in possession of a tract of land are admissible to show the character and extent of his possession. Seawell v. Young, 77 Ark. 309, 91 S. W. 544; Waldrop v. Ruddell, 96 Ark. 171, 131 S. W. 670. Moreover, if error was committed in this connection in the instant case, it was invited by appellants. In response to questions by his counsel, appellant Thacker testified that appellees were claiming lands south of a certain line they had staked, which included the lands in controversy. The trial court, in Instruction No. 8, limited the jury's consideration to those statements made while appellees were in actual possession of the lands and there was no error in the admission of this evidence.

The trial court sustained appellees' objection to the introduction of title records from the government to appellants' lessor, Lester Kent. Appellants insist that this was error, since appellees in their answer alleged that appellants' lessor was without title to the property. The principal issue before the jury was whether appellees entered upon and held the lands under a just claim of title or ownership and the testimony was directed to these issues. Appellees made no claim of record title to the property and their right of possession was based entirely on adverse possession, which, if established, would give them the right to possession regardless of the status of the record title. As previously stated, evidence of title is admissible only for the purpose of proving the right and extent of possession and is otherwise inadmissible under the statute. Where evidence is competent for a specific purpose and otherwise incompetent, it is the duty of the party offering the same to request the court to admit the testimony for the purpose for which it is competent. Kansas City Southern Ry. Co. v. Leslie, 112

Ark. 305, 167 S. W. 83, Ann. Cas. 1915B, 834.[1] The trial court would doubtless have admitted this evidence, if appellants had specified the purpose for which it was offered, but it did not amount to prejudicial error to exclude it in the absence of such request.

It is next argued that error was committed in the giving of the court's instructions Nos. 3, 4, and 5. The principal objection to these instructions now, as on the former appeal, is that there was no competent evidence to support the giving thereof. These instructions were given at the first trial under evidence which is substantially the same as that produced on the second trial. We held on the former appeal that there was no error in the refusing or giving of instructions and that holding is binding as the law of the case on this appeal insofar as these instructions are concerned. *Stortz* v. *Fullerton,* 185 Ark. 634, 48 S. W. 2d 560, and cases there cited.

In addition to the instructions given at the first trial the court, at appellees' request, instructed the jury as follows: "You are instructed that the expression, 'Claim of title', should be construed to mean a claim having some appearance of legality, and not a mere claim without the appearance or pretense of anything to base it upon." Appellants offered other instructions defining the phrase "just claim of ownership" as used in other instructions and it is argued that the instruction given at the request of appellees was not sufficiently full and complete. The law as stated in the instruction given was approved by this court in Towell v. Etter, 69 Ark. 34, 59 S. W. 1096, 63 S. W. 53. The court is not required to give multiple instructions on one issue. The gist of the instructions offered is that a "just claim of ownership" is equivalent to a "just title". While the court might well have given one of the requested instructions, we hold that a refusal to do so did not constitute reversible error.

Appellants also insist that the court erred in refusing to instruct the jury that it could not consider any evi-

[1] This case was reversed by the U. S. Supreme Court on another point in *Kansas City Southern Ry. Co.* v. *Leslie,* 238 U. S. 599, 35 S. Ct. 844, 59 L. Ed. 1478.

dence of appellees' claim of adverse possession prior to March 3, 1941, the date of the default ejectment judgment against Steve Hicks. It is noted that the writ of ejectment issued upon this judgment was never served and that appellees were within a few months adjudged insane by the probate court and thereby removed from the lands. Since only the right to possession based on a just claim of ownership, and not title to the property, is involved here; and since the circumstances in the record before us indicate the possibility of appellees' insanity at the time of the default judgment against Steve Hicks, we conclude that the trial court did not err in refusing to give the requested instruction, which would have amounted to a peremptory finding for appellants on the whole case. As heretofore indicated, the judgment here is not *res judicata* to an action in ejectment.

It is finally insisted that the verdict of the jury was so indefinite and uncertain that a judgment could not be rendered thereon; and that the court invaded the province of the jury by determining the description of the property in the judgment. Appellants duly objected to the following form of verdict submitted to the jury in the event of a finding for appellees: "We, the Jury, find for the defendants for restitution of the property claimed by them and assessed their damages at..... Dollars." Appellants requested and the court refused to submit in lieu of the form above, the following: "We, the Jury, find for the defendants for the restitution of the following property:.....and assess their damages at.....Dollars." The jury used the form submitted in returning their verdict.

Appellants earnestly insist that the boundaries of the land claimed by appellees cannot be ascertained from the evidence and they point to the different estimates made by witnesses as to the acreage claimed and possessed by appellees. The burden was upon appellants as plaintiffs to prove their cause of action. In the discharge of this burden it was shown by appellant Thacker and another witness that appellees were holding and claiming lands which included the Frl. N ½ of SE ¼ of Sec. 29,

Township 18 North, Range 8 East, which is the description used in the judgment. It is true that witnesses for appellees gave different estimates of the acreage claimed by appellees. These estimates varied from 40 to 120 acres. Appellee, Tommie Hicks, testified that they were claiming "about 40 acres".

Appellants rely on the case of Russell v. Webb, 96 Ark. 190, 131 S. W. 456. That case involved the sufficiency of a verdict in an ejectment suit. The court said: "A verdict should be definite and certain and free from obscurity, but it is not necessary that there should be any absolute precision in the wording of the verdict. If the meaning of the jury can be clearly collected from the verdict, it ought not to be set aside. It is the settled rule that the verdict should be construed liberally, with the view of ascertaining the meaning of the jury and supporting their verdict. And if the issue presented by the pleadings has been substantially decided by the jury, and their meaning can be satisfactorily collected from their verdict, then it is the duty of the court to mould it into proper form by its judgment . . .

"A verdict should show sufficiently what has been awarded to the party in whose favor it has been rendered; and where land is awarded, it should not be so uncertain that a writ of possession could not be issued on it and executed. But the description is sufficient where it is reasonably certain, or where it can be made certain, so that the land can be identified. This certainty may be established by reference to monuments upon the ground or to some recorded map or by some well known and understood manner of location." When the testimony is considered in the light most favorable to appellees and the rules as above stated, we think it sufficiently definite to show that appellees occupied, claimed and exercised dominion over the lands described in the judgment, which correctly reflects the meaning of the jury.

We find no prejudicial error and the judgment is affirmed.

4-8941 223 S. W. 2d 759

Opinion delivered October 24, 1949.

Warren E. Wood and *Griffin Smith, Jr.,* for appellant.

Malcolm W. Gannaway and *James B. Gannaway,* for appellee.

HOLT, J. Appellant sought by this action to recover death benefits under the terms of a health and accident quarterly term policy issued by appellee September 3, 1940, to Anna Powell, appellant's wife. Anna Powell was accidently killed January 5, 1948. Appellee, insurance company, contended that the policy was not in effect at the time the insured met her death and the trial court, a jury having been waived, sustained appellee's contention. This appeal followed.

It appears to be undisputed that following the issuance of the policy the first premium paid the insurance to twelve o'clock noon January 1, 1941, and that for the year 1941, and the first half of 1942, each quarterly premium was made on the first day of each quarter.

The quarterly payment of $4.50 due July 1, 1942, was paid September 9, 1942, a receipt countersigned by the company issued to the insured to the effect that the policy was reinstated on that day, September 9, for accidents sustained thereafter until twelve o'clock noon, standard time, December 1, 1942. This September 9th payment was credited by the company to the months of September, October and November, 1942, there being no coverage until September 9th. Next quarterly premium was paid December 16, 1942, and credited to months of December, 1942, January, 1943, and February, 1943. (No coverage between December 1, 1942, and December 16.) Quarterly premium paid March 15, 1943, credited to months of March, April, and May. (No coverage between March 1, 1943, and March 15, 1943.) Appellee thereafter accepted late quarterly premiums on June 21, 1943, June 12, 1945, October 15, 1945, October 10, 1946, and on October 14, 1947. The last quarterly premium was paid by the insured October 14, 1947, which payment was credited by appellee to the remainder of October, all November and December, 1947, there being no coverage between October 1 and October 14.

Appellee reinstated the policy on such dates, but its contention was that coverage was limited to the remainder of the month in which reinstatement occurred and the succeeding two months only, or until the next quarterly premium was due and payable on the first day of the next regular quarter. In other words, appellee contends that this last quarterly premium here was restricted to coverage for the remainder of October in which reinstatement occurred and the succeeding two months only, making another quarterly premium due and payable on the first day of the next regular quarter, January 1, 1948.

Appellant argues that this quarterly premium payment on October 14th required appellee to give to the insured a full three month's coverage, dating from October 14th, which would carry the coverage to January 15, 1948, and beyond the date of insured's death, January 5, 1948.

It appears that a receipt countersigned by appellee was issued to the insured when each quarterly payment was made. All receipts were alike except as to date. The one here involved provided: "Payment of this premium receipted for, if made on or before the date to which premiums have already been paid, keeps your policy in continuous effect, and if made after that date, reinstates the policy on the date of this receipt, as provided in policy, until twelve o'clock noon, Standard time, January 1, 1948, at which time another premium will be due."

The insurance contract involved provides that protection ceases when premiums are unpaid, but that reinstatement may be effected by subsequent payment of premium. The policy provides: "If default be made in the payment of the agreed payment for this policy, the subsequent acceptance of a premium by the Association . . . shall reinstate the policy but only to cover accidental injuries thereafter sustained and such sickness as may begin more than ten days after the date of acceptance."

Paragraph C provides: "The term of this policy begins at twelve o'clock noon, Standard time, on date of delivery to and acceptance by the insured against accident and on the thirty-first day thereafter against disease, and ends at twelve o'clock noon on date any renewal is due."

Appellant thus states the issues: "1. Where an accident policy provides that it will lapse if premiums are not paid, but may be reinstated upon subsequent acceptance of a premium by the company, may coverage after reinstatement be restricted to a period less than the premium pays for if the policy omits such restriction? 2. Where receipts are issued for premiums given to reinstate a policy, do these receipts become a part of the policy and add to its terms?"

His position is "that premiums and coverage must be coextensive—that under the contract no penalty was provided for late payment, hence none could be assessed; that issuance of a receipt by the company could not

change the contract, because such action was wholly unilateral, there being no evidence of assent by insured, her silence or failure to protest being insufficient basis on which agreement could be predicated."

Appellee, on the other hand, in effect, earnestly contends that reduced coverage was contemplated and necessary when the insurance was reinstated because appellee was put to extra expense to secure reinstatement (reinstatement being optional with appellee), that the insured understood and agreed to this condition for the reason that she accepted the receipts without protest, that the receipt thereby became a part of the insurance contract, and insured (as well as appellant here) was bound by its provisions.

The question presented seems not to have been heretofore decided by this court. The essential facts appear not to be in dispute.

The insurance contract alone contains no provision upholding appellee's contention that each quarterly premium when paid kept the policy in force only for the remainder of the month in which payment was made and the remaining two months, or until the next quarterly due date. Unless, therefore, the receipt countersigned by the company, and issued to the insured, became a part of the insurance contract, or unless the insured is bound by accepting same without objection, then appellant would be entitled to prevail in this action.

No rule is better settled than that insurance contracts which are prepared by the company, when any doubt arises as to construction, must be construed most strictly against the insurer. The contract before us contains no provision that reinstatement will date from the first day of the next quarter. It contains no provision making the receipt a part of the contract of insurance. Obviously, it would have been an easy matter for the company to have so provided in the policy by a simple provision to the effect that any fractional part of a month remaining after the date of reinstatement should be paid for by the insured as a full month, or that the receipt would become a part of the contract of insur-

ance. Nor do we think that the acceptance of these receipts by the insured, without protest, and which she did not sign, made it a part of the contract, or that by such acceptance insured was bound by its provisions, in the circumstances.

The general or prevailing rule of law applicable to situations such as are presented here, is stated in *Vol. 167 A.L.R.*, under the Annotations — Insurance-Reinstatement-Coverage, p. 340, § b. Other insurance, in this language: "Where an insurance policy is by its nature a *term insurance contract,* providing for no grace period, . . . it would seem that the effective date of coverage should begin at the date on which the policy is reinstated, running prospectively for that period which the amount of premiums paid will purchase. In the ordinary policy of health and accident insurance the exact duration of the risk assumed by the insurer is set out, and such policies, even without express provisions to that effect, are generally regarded as a species of term insurance, not renewable except with the consent of the insurer, differing in this respect from the policies of life insurance, wherein the right of reinstatement is preserved to the insured as a contractual right. . . .

"In connection with health and accident policies the prevailing rule seems to be that reinstatement has a prospective effect dating from the time of reinstatement. The theory underlying this rule is predicated, inter alia, on the view that reinstatement is, in effect, a renewal for another term, creating a new contract prospective in nature, and, as reinstated or renewed, the policy covers losses thereafter sustained. Equally persuasive to the courts is the knowledge that a retroactive dating would unjustly deprive the insured of insurance protection for which he has paid, and would have the effect of compelling the insured to pay for insurance throughout a period for which the insurer is admittedly not liable."

Bearing in mind that the policy here in question is a quarterly term policy, with no grace period, when reinstatement is permitted, as here, we think a full term of

three months was contemplated, creating a new contract prospective, in effect, to cover "accidental injuries thereafter sustained." Certainly, it would be unjust to require the insured to pay for insurance over a period, when she was not covered and during which time no liability or risk attached to the insurance company.

Appellee seems to rely strongly on such cases as *American National Insurance Company v. Otis,* 122 Ark. 219, 183 S. W. 183, L. R. A. 1916E, 875, but that case is clearly distinguishable. There, the policy contains a reinstatement clause which provided (quoting from the opinion) "that the company would not be liable for death occurring within five weeks from the date of the reinstatement, etc." There, reinstatement occurred on the fourth day of January, 1915, and the insured died January 19, 1915. The reinstatement clause, *supra,* is far different and contains no such provisions as in this Otis case.

So, also, is the case of *National Equity Life Insurance Company v. Bourland,* 179 Ark. 398, 16 S.W. 2d 6, distinguishable. That case involved the construction of a life insurance contract which, together with a rider attached, contained provisions not present in the contract now before us and upon which the opinion was based.

Accordingly, the judgment is reversed and the cause remanded for further proceedings.

McFaddin, J., concurs.

The Chief Justice did not participate in the consideration or determination of this case, nor did he attend the conference at which it was discussed.

BROOKS *v.* CLAYWELL.

4-8948 224 S. W. 2d 37

Opinion delivered October 31, 1949.

Rehearing denied December 5, 1949.

Ed. K. Brook, for appellant.

Sampier & Ford, for appellee.

FRANK G. SMITH, J. Claim for compensation was filed by appellee Jan. 21, 1948, claiming that he was employed by Brook's Inc., a domestic corporation, which regularly employed five or more employees, and that he was injured in the course of his employment on November 20, 1947.

A hearing was had before one of the Commissioners at which time it was stipulated that appellee was employed by Brook's Inc., hereinafter referred to as appellant, on and prior to November 20, 1947, and that he was accidentally injured while so employed, and that his injury arose out of and in the course of his employment and that he was earning $25 per week when injured.

An order was filed by the Commission on Aug. 25, 1948, holding that Edward E. Brook, president of appellant company, was one of its employees, working in a dual capacity, making a total of five employees of the Corporation, which, if true, gave the Commission jurisdiction of the claim filed with it. Appellant contended, and now contends, that it had only four employees when appellee was injured, and that therefore the Commission had no jurisdiction of the claim. See paragraph (c), § 2, Workmen's Compensation Act, Act 319, Acts of 1939, p. 777.

Upon the finding stated the Commission approved the claim and awarded the compensation fixed by the Compensation Act, from which award an appeal was duly prosecuted to the Circuit Court, where the Commission's award was affirmed.

Appellant says the only question before the court on this appeal is whether Brook, the president of the appellant company, was an employee as contemplated by the Compensation Act. The question presented for decision is therefore one of fact, and the rule must be applied here, as in all other cases arising under the Act, that the Commission's finding on question of fact will be given the same finality as the verdict of a jury and be affirmed, if there is sufficient competent testimony to support the finding.

Now, as stated, it is conceded that appellee himself was an employee of appellant, and was injured in the course of his employment, and is therefore entitled to the compensation fixed by the Compensation Act, if that Act is applicable, and its applicability is dependent upon the question whether Brook was an employee when appellee was injured.

Brook was president, and manager of the Corporation and testified that he drew no salary, his exact testimony being, "I drew what I needed to get by—we have not decided on a salary until we start making a larger profit. I draw what I need every day."

The appellant company was organized in 1946, and its report to the Internal Revenue Collector for 1947

shows that for that fiscal year it paid social security tax on five employees, but Brook was not one of that number, and no tax has ever been paid for him. The records of the corporation were introduced, which reflect a resolution by its board of directors that "There shall be paid to Edward E. Brook, president and manager of the corporation's business, as compensation for his services to the corporation in those capacities, a salary in the amount of (not decided) per month, which salary shall be paid monthly out of the funds of the corporation."

It thus appears that it was contemplated and provided that Brook should have a salary to be paid monthly, although the amount thereof was not fixed, and that in the meantime he drew from the company what he needed every day. Now Brook was to be paid for his services not only as president of the company, but also for his services as its manager. The record reflects that his services as president were not extensive, and probably required but little of his time, yet his entire time was devoted to the company's business, he says as its manager.

But what service was he performing? He testified that the company's business was "Appliances, air conditioning and heating services," and that his duties as president were "a little of everything we do there. I do part of almost everything, supervision of our jobs and our sales staff, our shop men and bookkeepers and also sales personel. We have two floors in our store and it depends on what is going on as to what I am doing. I may be waiting on a customer or helping on a radio, or maybe I am bidding on a job or writing a letter." He further testified that at other times his employment was to wait on customers, trying to sell them something, and he further testified: Q. "Do you go out on the job when the men are working at any time?" A. "Yes sir." Q. "What do you do out there " A. "I see what is going on and see if I can recommend anything, and if they need a hand on lifting something I will help them in lifting."

Section 2 of the Compensation Act defines an employer as "Any individual, partnership, association or

corporation carrying on any employment. . . ." The Act also defines employee and the definition given is "Any person, including a minor whether lawfully or unlawfully employed, in the service of an employer under any contract of hire or apprenticeship, written or oral, expressed or implied, but excluding one whose employment is casual and not in the course of the trade, business or profession or occupation of his employer." Paragraph (c) § 2 of the Act provides that employment means "every employment carried on in the State in which five or more employees are regularly employed in the same business or establishment . . ." with certain exceptions not applicable here.

The record shows that until within two days before appellee's injury one Tate was an employee of appellant company, and, that if he were counted, appellant had five employees when appellee was injured, excluding Brook, but the Commission did not base its holding that the Compensation Act was applicable upon the finding that appellant had five regular employees, excluding Brook, when appellee was injured, although that finding might have been made upon the authority of the case of Green v. Benedict, 102 Conn. 1, 128 Atl. 20. But it did base its award upon the finding that Brook was himself an employee, and that without him there were not five employees of appellant when appellee was injured.

The Commission's opinion recites "From the testimony in this case it is the opinion of the Commission that Mr. Brook, president of Brook's Inc., was acting in a dual relationship with the corporation, that of office of president, and that of an employee as salesman."

That Brook was acting in a dual capacity was shown by his own testimony, so that in its last analysis the question is whether an executive acting in a dual capacity may be counted as an employee in determining the jurisdiction of the Commission.

The authorities appear to be divided and we do not determine where the weight of authority lies, as we have held that one may act in a dual capacity and if with the knowledge and consent of the employer he acts in a

capacity which confers jurisdiction, he will be considered as one acting in that capacity, although he has another relationship. See Soltz Machinery & Supply Co. v. McGehee, 208 Ark. 747, 187 S. W. 2d 896, and Parker Stave Co. v. Hines, 209 Ark. 438, 190 S.W. 2d, 620. In the case last cited we quoted from the former opinion as follows:

"In the recent case of Soltz Machinery & Supply Company v. McGehee, 208 Ark. 747, 187 S.W. 2d 896, the following statement from Schneider's Workmen's Compensation Text, Vol. 4, Permanent Ed., § 1076, was cited with approval: 'While in all ordinary transactions the existence of the relation of contractor as between two given persons excludes that of principal and agent, or master and servant, there is not necessarily such a repugnance between them that they cannot exist together, and an employee may be an independent contractor as to certain work, and yet be a mere servant as to other work for the same employer. The decisions recognize that principle.' "

In Vol. 1, 2nd Ed. Schneider's Compensation Law, p. 229, it is said: "Whether officers of a corporation could be counted to make up the required five or more employees within the meaning of the act would depend on the facts of the particular case, whether they were actually regularly employed in the usual course of the business of the corporation."

If an executive officer may in certain cases be counted as an employee to determine the jurisdiction of the Commission, we think the commission was warranted in finding that Brook may be so counted in this case, as, not only a substantial, but the principal part of his duties were those ordinarily discharged by an employee not acting in an executive capacity.

In Vol. 35, No. 10, of the University of Arkansas Law School Bulletin at page 3 there appears a Review of the opinions of the Arkansas Workmen's Compensation Commission, written by a long time member of the Commission, in which it is said: "The Commission holds that the title and theory of the Compensation Act imports the idea of compensation for workmen and their dependents

and would not ordinarily be deemed to refer to executive officers receiving large salaries and engaged exclusively in designing and executing the general policies of business, but when an executive does the work of an employee or acts in a dual capacity as executive and employee and is injured while performing the duties of an employee, the injury is compensable. The test of the right to compensation is not the title of the injured employee, but the nature and the quality of the act he is performing at the time of the injury."

Brook is not a claimant but his relationship to appellant is determinative of the Commission's jurisdiction to adjudge claims against the corporation. At page 174 of Honnold on Workmen's Compensation, it is said: "The California Commission has held that where the corporate stock is all in the hands of the directors, two directors, father and son, as president and secretary, being authorized to exercise full control of the business, the son, on being injured while acting in the course of his employment as secretary, can recover compensation against such close corporation; also that the fact that one was general manager on a salary conclusively showed the fact of his employment, though he was also president of the corporation."

In the case of In re Raynes, 66 Ind. App. 321, 118 N. E. 387, it was said by Div. 2 of the Appellate Court of Indiana: "It appears to us as sound that compensation under Workmen's Compensation Acts cannot be denied one simply because he happens to be the president or other executive or managing officer of the corporation that employs him, and that fact alone is not sufficient to eliminate him from among those regarded as employees within the meaning of such acts. If the corporation is great and powerful, with extensive financial resources; if an officer is a large stockholder and his time is occupied in the discharge of the usual duties of his office and his salary is fixed because of the discharge of such duties—it would seem apparent that he could not be regarded as an employee under such an act. But in another corporation of humbler proportions such an official might serve in

a dual capacity; that is, as an officer and also as a workman. It is not unreasonable to conceive of a case where the discharge of the official duties would constitute but a small portion of the services rendered by him to the corporation. Such an officer might be hired in fact to perform manual labor in connection with other employees, and his time in the main be occupied in performing such service and regular wages paid him accordingly. Such an official in his capacity as a workman might measure up in all respects to the conception of an employee within the meaning of the act as we have hereinbefore developed it, and in such capacity we believe that he should be regarded as an employee within the meaning of Compensation Acts."

In the case of Parker Stave Co. v. Hines, supra, it is said: "In determining whether one is an employee or an independent contractor, the Compensation Act is to be given a liberal construction in favor of the workman, and any doubt is to be resolved in favor of his status as an employee rather than an independent contractor. Irvan v. Bounds, 205 Ark. 752, 170 S.W. 2d 674; 71 C.J., p. 449."

The same liberal rule of construction should be applied in determining whether Brook was an employee, although he was also an executive, and when so applied we think the testimony supports the Commission's finding that Brook was an employee. We said in the case of Irvan v. Bounds, above cited, that no hard and fast rule for determining the relationship of the parties in every case of this kind can be formulated, and we are not attempting to do so, as every case must be governed by its own peculiar facts, but when the Act is liberally construed we think the Commission had jurisdiction, and as no other question is raised, the judgment is affirmed.

George Rose Smith, J., dissenting. We are so accustomed to the fiction of corporate entity that at first blush it may seem novel for any one to contend that the president of a corporation is not its employee. Of course he is an employee for many purposes, as for the rule of

respondeat superior, but I can find no case holding that the owner of a business is *ipso facto* an employee within a compensation law merely because the business is incorporated. The courts point out that the very title of a Workmen's Compensation Act indicates the intention to benefit the workman rather than the executive head of the concern. These statutes provide a small weekly income, usually limited to twenty or twenty-five dollars, for workmen to whom disability would otherwise mean a cessation of income. This consideration does not apply to the executive officers of the company, whose salaries usually continue during disability and to whom the weekly payments would be more in the nature of pocket money than of a means of subsistence during unemployment. For these reasons the cases uniformly hold that an employee's status for compensation purposes depends upon his relative position in the hierarchy of the business rather than upon the fact that the organization is incorporated. Cases very similar to this one on the facts include *Leigh Aitchison, Inc.,* v. *Industrial Commission,* 188 Wis. 218, 205 N. W. 806, 44 A. L. R. 1213, and *Donaldson* v. *Wm. H. B. Donaldson Co.,* 176 Minn. 422, 223 N. W. 772, both denying compensation to the president of a corporation.

I agree that in some cases the president might also be an employee, but here the undisputed facts do not establish such a case. The true test of the employer-employee relationship is that of supervision and control. An employee must be employed *by* some one. Brook was in effect the owner of this business. The other stockholders were his sister and brother-in-law, who lived in Blytheville and never took the slightest interest in the company. No dividends had ever been paid. All the profits were taken by Brook himself, without accountability to any one. In the store itself Brook was in absolute control. The other workers were all under his supervision, but he took orders from no one. The business was in fact an individual proprietorship, though conducted as a corporation.

The Commission rested its decision solely on Brook's testimony that at times he went behind the counter and

sold goods to the public. It was said that in so doing Brook was acting as an employee and not as the president of the corporation. But the fallacy in this statement is that an employee's status is not to be determined by the nature of his activities while at work; the test is whether those activities are subject to some one else's supervision and control. As I cannot find a syllable in this record to indicate that any one else had the power to direct Brook's activities, I think we must say as a matter of law that he was not an employee. No issue of fact is involved.

The policy favoring a liberal construction of the Act is not applicable here. So far as I can find, this is the only reported case in which it has been necessary to count an executive officer as an employee in order to provide compensation for a true employee. In all the other cases it has been the president or other officer who was injured and applied for compensation. We may assume that our cases in the future will be of that nature. Thus the practical effect of this decision will be to provide compensation for executive officers rather than for the workmen contemplated by the Act.

GAZAWAY *v.* STATE.

4578 224 S. W. 2d 28

Opinion delivered October 31, 1949.

S. L. Richardson, for appellant.

Ike Murry, Attorney General, and *Robert Downie,* Assistant Attorney General, for appellee.

Ed. F. McFaddin, Justice. Appellant was convicted of grand larceny for the theft of a promissory note in the face amount of $400, and prosecutes this appeal.

From the evidence the jury could well have found the facts to be as recited in this paragraph: Woodrow Gazaway was the stepson of Enoch D. Phillips. Appellant at two different times had been the wife of Woodrow Gazaway, but claimed to be divorced from him at the time of the events herein detailed. In May, 1948, Phillips loaned Woodrow Gazaway and the appellant the sum of $400; and they executed to him their joint and several promissory note for said amount, secured by a mortgage of a truck and of a cow and increase; and both Woodrow Gazaway and the appellant signed the mortgage as well as the note. After disposing of the mortgaged property, Woodrow Gazaway left for parts unknown. In July, 1948, the appellant went to the home of Enoch D. Phillips and asked to see the said note. He handed it to her for inspection, but she departed with it; and it has never been found.

After the State developed the evidence above recited, Mrs. Gazaway offered as her defense, *inter alia,* that

Enoch D. Phillips surrendered the note to Woodrow Gazaway when he paid the note in full in June, 1948; and that she went to see Phillips about some personal matters, but that she did not take the note from him. The jury found against her on these facts, and the verdict is sustained by the State's evidence.

Appellant's motion for new trial contains 20 assignments, but her attorney has materially aided our study of the case by grouping the 20 assignments in three topic headings, which we copy from appellant's brief.

I. *Value of the Note.* "Grounds Nos. 1, 2, 3, 6, 7, 8, 9, 10, 15, 16, 18, 19 and 20 of the motion for new trial may well be presented together, as they sought a new trial because of (1) errors of the court in ruling adversely to the defendant's repeated contention that the note being worthless, nothing could be collected thereon, and therefore the grade of the offense could not be grand larceny; and (2) if such note was the subject of larceny, it would be, under the circumstances, only petit larceny."

II. *Refusal to Instruct on Petit Larceny.* "Grounds Nos. 12, 13 and 14 may well be argued together, as they allege error by the court in practically instructing a verdict for grand larceny against the defendant, and in failing to instruct the jury as to petit larceny."[1]

III. *Rulings as to Evidence.* "Grounds Nos. 4, 5 and 17 may well be argued together, as they go to the issue of the admission of incompetent and prejudicial testimony on behalf of the State, resulting in her conviction and an excessive punishment."

We discuss the issues as thus presented:

I. *Value of the Note;* and

II. *Refusal to Instruct on Petit Larceny.* Appellant's main insistence is that the said $400 note was worthless, so that even if she had taken the note, still she would not have been guilty of grand larceny; and she also insists that the court was in error in refusing

[1] Assignment No. 11 in the motion for new trial also related to an instruction involving the word "felonious"; and is considered in this same topic.

to charge the jury on the crime of petit larceny. Appellant offered testimony as to the poverty of herself and Woodrow Gazaway; and this evidence was designed to show that Enoch D. Phillips could never have realized anything on his note, so the taking of it was a matter of no consequence.

The trial court, in denying all of appellant's claims on these points, instructed the jury in the language of the statute—Section 41-3906, Ark. Stats. (1947)—which, stripped of language extraneous to this case, reads:

"If the property stolen consists of . . . any evidence of debt whatever . . . the money due thereon . . . shall be adjudged the value of the article stolen."

The promissory note was certainly "evidence of debt," since it was the promise of the Gazaways to pay $400 that had previously been loaned to them by Phillips. The statute fixes the face amount of the note, and not its realizable amount, as the value of the property stolen.

In *McDowell* v. *State,* 74 Miss. 373, 20 So. 864, the Supreme Court of Mississippi, in a case in which the defense was similar to the one here, said in regard to a statute similar to § 41-3906, Ark. Stats. (1947):

"The statute was designed to relieve the State from the burden of proving the actual value of bonds, bills, notes, etc., by making the face value to be deemed the real value, without further proof. It surely was never before thought that two insolvent debtors, who had refused to pay their indebtedness, might steal the evidence of their indebtedness, and successfully plead insolvency and a refusal to pay in justification of the larceny."

We adopt the above quotation as applicable to this case. The trial court in the case at bar was correct in its rulings concerning the value of the property, and also in its refusal to instruct concerning petit larceny.

III. *Rulings as to Evidence.* Appellant became a witness in her own behalf, and it is claimed that the trial court committed error in allowing the State to question

her on cross-examination as to two matters: (a) whether she and Woodrow Gazaway were in fact divorced when the money was borrowed and the note signed (it having been shown that they were occupying the same house); and (b) whether the cow included in the mortgage to Enoch D. Phillips was the same cow as the one mortgaged by appellant to a bank. We find no error in the court's rulings allowing the cross-examination as to these items, since such cross-examination was certainly designed to test the credibility of the appellant, who had become a witness in her own behalf. What we said in *Jutson* v. *State,* 213 Ark. 193, 209 S. W. 2d 681, is apropos:

"This court has repeatedly held that it is proper to interrogate a defendant, or other witness, on cross-examination, touching his recent residence, occupation and associations, as affecting his credibility as a witness. *Hollingsworth* v. *State,* 53 Ark. 387, 14 S. W. 41; *Hughes* v. *State,* 70 Ark. 420, 68 S. W. 676; *McAlister* v. *State,* 99 Ark. 604, 139 S. W. 684; *Sweeney* v. *State,* 161 Ark. 278, 256 S. W. 73."

See, also, *Hunt* v. *State,* 114 Ark. 239, 169 S. W. 773, L. R. A. 1915B, 131, 131 Ann. Cas. 1916D, 533, and *Trotter* v. *State, ante,* p. 121, 219 S. W. 2d 636.

Finding no error, the judgment is affirmed.

BOARD OF EDUCATION FOR INDEPENDENCE COUNTY
v. BOARD OF DIRECTORS OF SPECIAL SCHOOL DIST. No. 6.

4-9022 224 S. W. 2d 13

Opinion delivered October 31, 1949.

W. D. Murphy, Jr., and *M. F. Highsmith,* for appellant.

J. J. McCaleb and *Chas. F. Cole,* for appellee.

GRIFFIN SMITH, Chief Justice. Determination of issues raised by this appeal centers on whether annexation proceedings involving school districts embracing territory in more than one county are governed by Act 327 of 1947 or Act 387 of 1939.

On January 22, 1949, an election was held in three school districts in Independence County, including District 48, to determine whether they should consolidate into a single district or join District 33 in Independence County. The results, on January 25, favored consolidation. Concurrently a petition executed by a majority of the qualified electors of District 48 was filed with the Independence County Board of Education seeking annexation of the northern part of District 48 to Strawberry District 22, Lawrence County, which was approved by the Independence County Board and order entered.

Strawberry District 22 is located principally in Lawrence County, though a portion extends into Independence County. On February 12, the Lawrence County Board passed a motion approving the action of the Independence County Board. Written Consent of the directors of each district was filed with the annexation petition.

The directors of Independence District 6, the newly created district from which a portion of District 48 was ordered detached, after an unsuccessful attempt to appeal to circuit court, filed a petition for certiorari with the circuit court alleging that the annexation order of the Independence County Board was void because notice was not properly given and because the former directors of Districts 48 were without authority to consent to annexation.

The circuit court granted certiorari and quashed the order of annexation, finding that Act 327 of 1947 was applicable and that the jurisdictional requirement of notice had not been complied with.

Appellants, for reversal, urge that (1) appellees were not proper parties to attack the order because they were not parties to the record at the time the order was entered, (2) Act 327 of 1947 does not apply to changes in boundaries between existing districts, but only to formation or dissolution of districts involving territory in more than one county.

Appellees, as directors of the district from which territory had been detached by the annexation order, were proper parties to seek redress. Appellants' argument that appellees are simply directors of an adjacent school district which was not in existence at the time the order of annexation was entered does not take into consideration that the order is other than valid. If it were void, a duty rested on appellees to supervise the territory the order sought to remove from their jurisdiction, and they could question the legality of any order purporting to deprive them of property ostensibly subject to their supervision.

The applicable statute is Act 327 of 1947, rather than Act 387 of 1939. While neither specifically covers the present situation, the '47 Act concerns districts in two or more counties, while the '39 Act fails to take into consideration anything but a change of boundary.

An express term in Act 327 of 1947 is "changes of boundaries of school districts in such situations." While it may be argued that this phrase is restricted to new-district cases, the subject matter of the 1947 Act clearly involves multi-county districts, while Act 387 of 1939 does not mention them. The '47 Act sets up machinery for action by more than one county board, while the '39 Act envisions action by only one. The General Assembly must have recognized the fact that one county board could not appropriately administer annexation of territory in more than one county, and since no provision is made in the '39 Act for joint action in the sense that it is permitted by the '47 Act, the '47 Act can be better applied where multi-county territory is involved.

It is stipulated that Act 327 of 1947 was not followed by appellants, though it is argued that only substantial

compliance was necessary and that such compliance was shown. In view of the fact that appellants admittedly were proceeding under Act 387 of 1939, there does not appear to be sound basis for this argument. Nor can appellees be held to have waived objection by attending the January 25 meeting of the Independence County Board when the annexation order was entered. Notice is not the only requirement of Act 327 of 1947, and whether other provisions could be waived is a matter not necessary to now decide.

Affirmed.

WILLIAMS *v.* HARRIS, MAYOR.

4-9004 224 S. W. 2d 9

Opinion delivered October 31, 1949.

Linus A. Williams, for appellant.

J. H. Brock, for appellee.

LEFLAR, J. The City Council of Clarksville on May 31, 1949, adopted an ordinance authorizing the issuance, subject to favorable vote at a special municipal election, of $100,000 in bonds, the proceeds of which were to be used to contribute "to the cost of a factory building for the purpose of securing a new manufacturing enterprise for the City." The bonds were "to mature serially at the rate of $20,000 per year" for five years, and were "to be payable solely from the net revenues . . . derived by the City from the ownership and operation of its electric light and power plant."

This ordinance was adopted under authority of the Arkansas General Assembly's Act 463 of 1949. Act 463, after defining the term "municipality" to mean "a city of the second class," provided that any such municipality should have the power to issue bonds for any public purpose, with the following proviso:

"Section 5. Bonds issued under the provisions of this Act shall be payable solely from the net revenues derived by the municipality from the operation of one or more public utility plants, which net revenues may be pledged for the payment of these bonds, and the revenue bonds shall not in any event constitute an indebtedness of such municipality within the meaning of the constitutional provisions or limitations, and it shall be plainly stated on the face of each bond that the same has been issued under the provisions of this Act and that it does not constitute an indebtedness of such municipality within any constitutional or statutory limitation."

A complaint in equity brought by Williams as a citizen and taxpayer of Clarksville against the mayor, recorder, and aldermen of the City sets up the facts just indicated, asserts that the $100,000 amount of the proposed bond issue is greater than the total revenues of the City of Clarksville from all sources for the current fiscal year, and alleges the unconstitutionality of the ordinance and of Act 463. The defendants filed a general demurrer. This demurrer was sustained by the Chancellor. Plaintiff appeals.

The relevant constitutional provisions are portions of Amendment 10 and Amendment 13 of the Constitution of Arkansas.

Amendment 10 provides that:

"The fiscal affairs of counties, cities and incorporated towns shall be conducted on a sound financial basis, . . . nor shall any city council, board of aldermen, board of public affairs, or commissioners of any city of the first or second class, or any incorporated town, enter into any contract or make any allowance for any purpose whatsoever or authorize the issuance of

any contract or warrants, scrip, or other evidences of indebtedness in excess of the revenue for such city or town for the current fiscal year; nor shall any mayor, city clerk or recorder, or any other officer or officers, however designated, of any city of the first or second class or incorporated town sign or issue any scrip, warrant or other certificate of indebtedness in excess of the revenue from all sources for the current fiscal year." The Amendment contains a similar limitation upon county indebtedness.

Amendment 13, among other things, limits the purposes for which cities of the first and second class may incur bonded indebtedness. The permissible purposes are set out in the third paragraph of the Amendment, and do not include the erection of factory buildings designed to aid in securing new manufacturing enterprises for a city, nor any equivalent purpose. Bonds for the permitted purposes may be issued only after the bond issue is approved by the electors at a municipal election. The seventh paragraph adds that "No municipality shall ever grant financial aid toward the construction of railroads or other private enterprises operated by any person, firm or corporation . . ."

In *McCutchen v. Siloam Springs,* 185 Ark. 846, 49 S.W. 2d 1037, this Court held that a city might, without violation of Amendment 10, incur indebtedness greater than its annual revenues for the purchase of new facilities for its municipal water, light and power plant, where the contract of indebtedness provided that the city was not obligated to pay the debt out of any fund except the net earnings from the plant. The Court said: "The consideration for this contract or the purchase price must and can only be paid under its terms as maintenance charges out of the gross receipts derived from the operation of the system after operating expenses have been paid, and not out of funds belonging to the city; hence the amendment referred to is not applicable to the instant contract, and not inhibited by it . . ." The case also held that Amendment 13 was not violated. *McCutchen* v. *Siloam Springs* has been followed in several subsequent decisions, all holding that Amendment

10 does not prohibit the incurring of a debt larger than the current annual revenues of a municipality if the debt is secured and payable solely out of income or assets of the special and separable activity for which the debt is incurred. In such situations the indebtedness is not deemed to be that of the city within the sense of Amendment 10. *Jernigan v. Harris,* 187 Ark. 705, 62 S.W. 2d 5 (waterworks and sewage systems combined); *McGehee* v. *Williams,* 191 Ark. 643, 87 S.W. 2d 46 (waterworks distribution system). And see *Mississippi Valley Power Co.* v. *Board of Improvement,* 185 Ark. 76, 46 S.W. 2d 32.

Amendment 13 has received a similar interpretation. In *Snodgrass* v. *Pocahontas,* 189 Ark. 819, 75 S.W. 2d 223, one question was whether the city could lawfully issue bonds for the improvement of its waterworks system, the bonds to be payable altogether from waterworks revenues, without first holding the municipal election prescribed by Amendment 13. This Court held that the election was unnecessary, saying: "It was not the intention to prohibit cities and towns from making improvements and pledging the revenue from the improvements so made alone to the payment of the indebtedness. . . . where the debt is to be paid out of the receipts derived from the operation of the system, and not out of funds belonging to the city, the indebtedness is valid and not prohibited by Amendment 13."[1]

In the cases so far mentioned, the indebtedness was to be paid from the proceeds of the identical activity for which the indebtedness was incurred, and that fact was relied upon by this Court in each case in sustaining the transaction. In two other cases in Arkansas the incurring of indebtedness has been sustained where the debt was to be paid from the income of a municipal activity different from the one for which the expenditure was to be made.

The first of these two cases is *Johnson* v. *Dermott,* 189 Ark. 830, 75 S.W. 2d 243, 103 A.L.R. 581. The city

[1] Also see *Robinson* v. *DeValls Bluff,* 197 Ark. 391, 122 S. W. 2d 552, sustaining an issue of bonds for construction of a barge terminal, the bonds being secured by and payable from the assets and income of the barge terminal alone.

of Dermott contracted to pledge the revenues of the municipal waterworks system to secure a loan from the proceeds of which it was proposed to construct a city hospital. It was not shown that the amount of the loan was in excess of the city's annual revenues, and it was clear that hospital construction was one of the purposes for which issuance of bonds was permissible under Amendment 13. In sustaining the hospital bond issue this Court said: "We conclude, therefore, that it is not beyond the power of the city to enter into a contract to erect a hospital and to segregate the revenues arising from the water and light systems and to pledge these excess revenues for that purpose. But this power may not be exercised in violation of Amendment No. 10 to the Constitution. Any contract which the city makes in regard to uncollected revenues from any source must be construed with reference to this amendment. Parties cannot, by pleadings or stipulations of any kind, abrogate this amendment which will be read into any contract which the city may make. This amendment provides that the fiscal affairs of counties, cities and incorporated towns shall be conducted on a sound financial basis, and that no allowance shall be made 'for any purpose whatsoever in excess of the revenues from all sources for the fiscal year in which said contract or allowance is made.' Beyond this inhibition there is a lack of power to contract."

The other case is *City of Harrison* v. *Braswell,* 209 Ark. 1094, 194 S.W. 2d 12, 165 A.L.R. 845. It involved a city ordinance authorizing issuance of bonds for improvement of the city's water and sewer systems. Though the two systems were of course closely related they were technically separate, and the bonds were to be separate for each. The bonds of each were primarily payable from revenues derived from its own system, but in addition the ordinance provided that any surplus in one system might be applied to retirement of the bonds of the other. The validity of this plan was upheld.[2] A

[2] *Mathers* v. *Moss,* 202 Ark. 554, 151 S. W. 2d 660, which held invalid a city ordinance permitting payment of the City of Dumas sewer bonds from waterworks revenues, was distinguished on the ground that its basis for decision was the absence of statutory author-

careful reading of the record filed in *City of Harrison* v. *Braswell,* as well as of the opinion therein, reveals no definite assertion that the amount of the bond issue was greater than the total revenues of the city for the current year, therefore it may be assumed that the facts involved no violation of the portion of Amendment 10 quoted above. Besides, the maintenance of water and sewer systems constitutes so nearly one operation, so much of an inter-related activity (as contrasted with the light and power plant and the unrelated erection of a factory building proposed in the present case) that it would not be wholly unreasonable to regard them as a single activity within the constitutional concepts developed in Arkansas under Amendments 10 and 13.

It is apparent from the preceding analysis of our earlier cases that we are asked in this case to go further than this Court has yet been willing to go. We are asked to uphold a municipal bond issue for a purpose not authorized by Amendment 13, in an amount above the limit set by Amendment 10, to be repaid from the funds of a municipal activity other than that for which the expenditure is to be made. No municipal bond issue heretofore approved by this Court has involved that combination or one like it.

A comparable situation had developed when the case of *Luter* v. *Pulaski County Hospital Assn.,* 182 Ark. 1099, 34 S.W. 2d 770, came before the Court. The case involved a debt of $600,000, a sum larger than a single year's revenue of Pulaski County, to be undertaken by the County for the construction of a new hospital. The transaction was held to be unconstitutional, under the portion of Amendment 10 which sets up the same limits on indebtedness for counties as apply in the present case to cities. The Court pointed out that in earlier decisions it had been constrained, in view of the expensive and essential character of courthouses and jails, to permit counties to go in debt for them beyond the limits prescribed by Amendment 10, but that Amendment 17 had

ity therefor, whereas a subsequently enacted statute was deemed to authorize the Harrison bond issue in the form prescribed by the ordinance.

in 1929 eliminated that exception to Amendment 10, and no further exceptions should be engrafted upon it. The *Luter* case has been approved in a number of cases, including *Stanfield* v. *Friddle,* 185 Ark. 873, 50 S.W. 2d 237; and *Ozark* v. *Ozark Water Co.,* 190 Ark. 872, 81 S.W. 2d 920. Its holding is as applicable to that part of Amendment 10 which deals with cities as to that part, similarly worded, which deals with counties.

A clear purpose of Amendments 10 and 13 was the assurance of financial stability for cities in Arkansas. It was the deliberate intent of the people to make it difficult for cities, in periods of local enthusiasm, to undertake large debts which would bind the citizens and the municipalities' assets in years to come. Whether this purpose was good or bad, it is a part of the Constitution. Self-supporting municipal activities may in a sense borrow on their own credit, independently of the city's credit. They may even lend their credit for the benefit of other municipal activities when the constitutional debt limit will not thereby be exceeded and the benefited activity is one for which the city has constitutional authority to issue bonds. The present case would go further, however, and free municipal borrowing altogether from the fetters fixed by these amendments in any case where the debt was to be paid from particular income-producing municipal property rather than from taxation. If this were permitted, a city would by indirection be enabled to saddle upon legitimate municipal enterprises the burden of interest-bearing certificates of indebtedness in amounts forbidden by the Constitution, for purposes not authorized by the Constitution. This we hold the Constitution does not permit.

The independent prohibition in the seventh paragraph of Amendment 13, that "no municipality shall ever grant financial aid toward the construction of railroads or other private enterprises operated by any person, firm or corporation" is also applicable to the facts here. The complaint alleges that the bond issue is "for the purpose of *contributing to* the cost of a factory building to be built *in* the city of Clarksville for the purpose of securing the location of a new manufacturing enterprise in

said City'' (italics ours). This wording differs slightly from that which appears in the ordinance, but from the words used it could be inferred that some manufacturer, rather than the City itself, might be or become the owner of the factory when built. If that should ensue, this paragraph of Amendment 13 would also be violated.

We hold that Act 463 of the Acts of the General Assembly of 1949, insofar as it authorizes the adoption of Clarksville City Ordinance No. 388, is unconstitutional.

The decree of the Chancery Court is therefore reversed and the cause is remanded with directions that the defendant's demurrer be overruled.

George Rose Smith, J., concurring.

Needham *v.* State.

4577 224 S. W. 2d 785

Opinion delivered October 31, 1949.

Rehearing denied December 12, 1949.

Claude F. Cooper and *Gene Bradley,* for appellant.

Ike Murry, Attorney General and *Jeff Duty,* Assistant Attorney General, for appellee.

GEORGE ROSE SMITH, J. The jury found the appellant guilty of rape and imposed the death penalty. This appeal is from a judgment entered upon the verdict.

The crime occurred several hours after midnight on April 10, 1949. The prosecutrix, an eight-year-old girl, had been put to bed at home. She testified that when she awoke she was in a car with a man. He stopped the car in a deserted street and put her in the back seat. He then removed her panties, opened his trousers and got on top of her. The child did not specifically describe the act of penetration but did say that the man was hurting her and that she was crying and asking to be taken home. Eventually she was put out of the car and told to walk home.

The child's mother, whom she awakened upon her return at five o'clock in the morning, testified that her daughter was covered with blood from her throat down to her toes. A physician who treated the child found the membrane of the vaginal canal so severely torn that three fingers could be inserted, although the opening would normally have been about half the size of a man's little finger. Fifteen stitches were required to close the wound.

The prosecutrix was able to identify the car as an ABC taxicab. Investigation at the cab company's place of business revealed a cab having dark stains on the front and rear seat covers. It was learned that appellant had been assigned to drive the vehicle during the night and that after turning in his cab he had left for Hattiesburg, Mississippi. The authorities there were notified and took appellant into custody at about eight o'clock that night. When arrested he was wearing a pair of trousers having reddish stains around the fly, and in his room at a tourist court was found a pair of shorts similarly stained. Both garments bore the appellant's laundry mark.

Appellant was returned to Blytheville the next day and questioned about the crime by the sheriff. This officer testified that appellant seemed cool and unconcerned, displaying a "smartish attitude." He stated

that the accused voluntarily confessed his guilt, after having been warned that any statement he might make could be used as evidence against him. In his confession appellant said that his passion had been aroused during a trip with a man and two women as passengers. He tried to go up to the women's hotel room, but the desk clerk refused permission. Appellant had formerly been in the habit of spending the night with a woman of his acquaintance, and he decided to go to the house where she had lived, not knowing whether it was still her residence. Finding the door unlocked he entered the house and saw the prosecutrix lying asleep. He picked up the sleeping child and carried her to his taxicab. From this point his confession is in substance the same as the prosecutrix' testimony, except that he explicitly admits penetration and the act of intercourse. There was a great deal of additional testimony, which we need not summarize except as it touches appellant's contentions.

I. The first contention, in the order of events at the trial below, is that a copy of the information was not served upon the accused at least forty-eight hours before the arraignment. Ark. Stats. (1947), § 43-1204. This contention is based on a deputy sheriff's testimony that he served the bench warrant but could not say whether a copy of the information was attached. This uncertainty was eliminated, however, by the testimony of the prosecuting attorney, who stated that he watched the clerk make out the bench warrant, attach the information, and hand the documents to the deputy sheriff. The accused was in the courtroom at the time, and the prosecuting attorney saw him receive both instruments. This occurred on Wednesday morning; the arraignment took place on Friday afternoon. This testimony sustains the finding that the information was properly served.

II. During the selection of the jury the prosecuting attorney was permitted to ask each juror if he had any conscientious scruples against the imposition of the death penalty. The statute defines implied bias as including such conscientious opinions as would preclude the juror from finding the defendant guilty of an offense punishable by death. Ark. Stats. (1947), § 43-1920. It is ar-

gued that the State should have been allowed to inquire only whether the juror's conscience would preclude his finding the defendant guilty, thereby permitting the service of jurors who would vote for a verdict of guilty but approve only the alternative penalty of life imprisonment. The history of our statutes rebuts this suggestion. When the statute defining implied bias was enacted the death penalty was mandatory; so it was then sufficient for the legislature to refer merely to a finding of guilt, the punishment following as a matter of course. Not until 1915 did the legislature give the jury the option of imposing life sentences in capital cases. *Ibid.,* § 43-2153. The legislature evidently meant for the jury to exercise its discretion in selecting the punishment, but it is obvious that a juror can exercise no discretion if his conscience does not permit him to vote for the death penalty in any case. The statutory history in Idaho has been identical with our own, and there it is held proper for the State to inquire whether a juror has scruples against capital punishment. *State v. Wilson,* 41 Idaho 616, 243 P. 359. Among many other cases approving this inquiry when the jury in its discretion may impose a life sentence are: *Shank v. People,* 79 Colo. 576, 247 P. 559; *State v. Leuch,* 198 Wash. 331, 88 P. 2d 440; *State v. Favorito,* 115 N.J.L. 197, 178 A. 765.

III. The defense counsel sought to ask a prospective juror if he would feel obligated to impose the death penalty rather than life imprisonment upon a finding of guilty. There was no prejudicial error in the trial court's refusal to allow this inquiry. Appellant argues that his question was merely the converse of the State's inquiry as to conscientious scruples, but we are unable to agree. The trial court has no discretion in permitting the State's inquiry, for the statute expressly recognizes such scruples as a cause for challenge. There is no corresponding statutory recognition of implied bias in favor of capital punishment; so the matter rests within the trial court's discretion. We have pointed out that the possible causes of bias are infinite. *Pierce v. Sicard,* 176 Ark. 511, 3 S.W. 2d 337. It is for this reason that the trial court is necessarily given a broad discretion in con-

trolling the examination of veniremen. Here the trial court stated that he did not think the juror could give a definite answer to the question without knowing all the evidence to be presented. In the absence of anything in the juror's earlier interrogation to indicate that he had a marked predilection for capital punishment we have no basis for finding an abuse of discretion.

IV. It is argued that the prosecutrix, at the age of eight, is not shown to have been a competent witness. This too is a matter that is primarily for the trial court to decide, since he is best able to judge the child's intelligence and understanding of the necessity for telling the truth. Wigmore on Evidence, § 507. In criminal cases we have approved the trial court's action in allowing children as young as this prosecutrix to testify. *DeVoe v. State,* 193 Ark. 3, 97 S.W. 2d 75; *Hudson v. State,* 207 Ark. 18, 179 S.W. 2d 165.

V. Several contentions stem from the State's introduction of appellant's confession. It is first argued that the *corpus delicti* had not been established, as the prosecutrix did not describe the act of penetration. If it were necessary that this element of rape be proved in every case by an eye-witness, the accused could not ordinarily be convicted if the prosecutrix' vision had been obscured by darkness, unconsciousness or any other cause. But that is not the law; penetration, like other facts, may be proved by means other than an account based on visual observation. Here the prosecutrix stated that the accused removed her panties, opened his trousers, got on top of her and caused her to suffer pain. In addition to this testimony the record shows her physical condition immediately after the assault, a physician's opinion that she had been entered, and the state of appellant's clothing when he was arrested. In view of this uncontradicted testimony the jury could hardly have reached any conclusion except that penetration had occurred, even if the confession had not been introduced.

VI. As we have seen, the appellant first confessed his guilt to the sheriff on the evening of his return to Arkansas. Other witnesses then came into the room,

and the story was repeated in their presence. The next morning the accused was put under oath and interrogated by the prosecuting attorney, a stenographic record of this proceeding being made. At the trial the sheriff was first examined in the judge's chambers; the court, over the appellant's objection, ruled that the confession was voluntarily made. The witness was then permitted to detail the confession in the jury's presence. The State then offered the transcript of the later interrogation, the reporter having verified its accuracy. The defense objected on the ground that since the transcript had not been signed it amounted merely to an oral confession, so that the reporter could use the transcript only to refresh his recollection of what was said. In effect the court sustained this objection, as a ruling was reserved and the transcript was not later admitted in evidence.

It is now urged that it was error to permit the prosecuting attorney to refer to the third version of the confession in his opening statement to the jury, since the written transcript was not introduced. We have held, however, that a narration of a confession in the opening statement is reversible error only if the confession is not later introduced in evidence. *Smith v. State,* 205 Ark. 1075, 172 S.W. 2d 248. Here the prosecuting attorney, in opening the case, detailed the contents of the first oral confession only; all he said about the third version was that the accused repeated the statements already made. In any event, a complete answer to appellant's contention is that before the State rested it had introduced witnesses who narrated each of the three versions of the confession—which in substance were all alike. Thus it cannot be said that the opening statement contained any version of the confession that was not later brought before the jury.

An allied contention is that the court erred in permitting oral proof of a confession later reduced to writing. It will be remembered, however, that the written transcript was excluded upon appellant's insistence that it could be used only to refresh the reporter's recollection of an oral confession. Appellant cannot be permitted to have the transcript excluded in the trial court upon the

theory that the confession was oral and then urge reversal here upon the theory that the confession was written.

VII. Appellant complains of the court's failure to instruct the jury not to consider the confession unless it was voluntarily made. The testimony that the confession was voluntary is undisputed. Several witnesses described the attendant circumstances; the accused did not take the stand to contradict their statements. Under our practice the question whether the confession was voluntary goes to the jury only if the evidence raises a doubt as to this issue. *Nelson v. State,* 190 Ark. 1078, 83 S.W. 2d 539. Here the State's uncontradicted evidence, if believed by the jury, did not raise a doubt; so the trial court was not required to submit the issue on its own motion.

We have held, however, that since the jury need not credit the officer's statement that no force or threats were used in obtaining a confession, the accused is entitled to an instruction if he asks for it, even though the State's proof is not contradicted. *Henry v. State,* 151 Ark. 620, 237 S.W. 454. Thus this issue narrows down to the question of whether the appellant requested a correct instruction on the subject. The record shows that he did not. When the instructions were being discussed in chambers the trial court submitted a proposed instruction that would have told the jury they were not to consider the confession unless they found, among other things, that it was voluntarily made. Appellant objected to the instruction as offered and asked that there be added a statement that the confession must have been made "without duress, fear, intimidation, hope of reward, or without any inquisitorial methods." The court refused the modification and later withdrew its own proposed instruction, without objection by the accused.

There was no error in the court's action, as these facts do not show a request for a correct instruction. If we assume that the court's instruction was correct, it certainly was not requested by appellant. On the contrary, he objected to it when it was offered and did not

object when it was withdrawn. What he did request was an instruction more favorable to him than the law requires: namely, that the confession must have been made "without inquisitorial methods." The first definition of "inquisitorial" is: "After the manner of an inquisitor." An inquisitor is defined as: "One who makes inquiry or investigation; specif., an officer of the law whose duty it is to investigate, as a sheriff or coroner." Funk & Wagnalls New Standard Dictionary. Thus the jury could properly have taken the instruction as modified to mean that the confession could not be considered if it was obtained by the sheriff in the course of an investigation or inquiry. As this is not a correct declaration of law, the instruction as modified was properly refused.

VIII. It is argued that the trial court erroneously refused to instruct the jury as to the lesser offense of assault with intent to commit rape. Such an instruction is unnecessary when the facts establishing the principal offense cannot be interpreted as proving the lesser offense instead. *Whittaker v. State,* 171 Ark. 762, 286 S.W. 937. Our recital of the facts shows that if rape was intended it was undoubtedly consummated. It was stated by a physician on cross-examination, however, that the prosecutrix' injuries could have been caused by the use of a man's hands. The argument now is that the accused may be a sexual pervert (he was so characterized by one witness for the defense) who did not either intend or accomplish an act of intercourse. The patent answer to this suggestion is that the proof still does not show the possibility of an assault with intent to rape; for one can intend to commit rape only if he intends to have sexual intercourse with his victim.

There are many other assignments of error. We have painstakingly examined them all, as well as the other objections appearing in the transcript. They pertain to matters of criminal law and procedure that are firmly established in the State's favor by statutes and decisions of long standing. It would add nothing to this opinion to include a discussion of all the errors assigned. Our summation of the evidence, winnowed from four

hundred pages of testimony, demonstrates the seriousness of the offense and the want of mitigating circumstances. We are convinced that appellant was fairly tried under law and that the evidence fully sustains the verdict and judgment.

Affirmed.

ON REHEARING

GEORGE ROSE SMITH, J. In part VII of our original opinion in this case we held that the trial court correctly refused an instruction that would have told the jury not to consider the accused's confession unless they found it to have been made "without any inquisitorial methods." We pointed out that the jury could properly have taken this language to mean that the confession could not be considered if it was obtained by the sheriff in the course of an inquiry or investigation. Hence the proposed instruction did not correctly state the law, for we have held that even persistent questioning by officers does not vitiate a confession that is otherwise properly obtained. *Greenwood* v. *State,* 107 Ark. 568, 156 S. W. 427. We adhere to the view that in this case the requested instruction was correctly refused.

In his petition for rehearing, however, the appellant insists that earlier opinions of this court have approved the phrase "inquisitorial methods." It is true that we have used the expression on more than one occasion, but in every instance the context has made it perfectly clear that something more than mere questioning was meant. For instance, in *Spurgeon* v. *State,* 160 Ark. 112, 254 S. W. 376, we stated that of course the officers had the right to interrogate the accused, but they had no right to coerce him "by a continuous inquisition persisted in to the extent of exhausting him physically and mentally and overcoming his will." The distinction made in that case is exactly the one that is ignored in the instruction offered by appellant.

Again in *Dewein* v. *State,* 114 Ark. 472, 170 S. W. 582, we used this language: "Where threats of harm, promises of favor or benefit, inflictions of pain, a show

of violence or inquisitorial methods are used to extort a confession, then the confession is attributed to such methods." There the whole context culminated in the phrase "extort a confession," which of course means to wrest it by force, menace, duress, torture, etc. Indeed, Webster's New International Dictionary gives the phrase, "to extort confessions," as illustrative of correct usage. No doubt the opinion in the *Dewein* case led to the instruction quoted in *Robinson* v. *State,* 177 Ark. 534, 7 S. W. 2d 5, in which the language of the earlier opinion—including the word "extort"—is embodied almost verbatim. Thus it is clear that our earlier cases have sanctioned a reference to inquisitorial methods only when the context brings out the difference between a permissible investigation and a prohibited extortion. The failure to make this distinction is the vice in the instruction offered below, for the instruction would have misled the jury concerning the law.

The petition for rehearing is denied.

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